APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 796

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1967
CERTIORARI GRANTED JANUARY 15, 1968

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INDEX TO APPENDIX

Chronological List of Relevant Docket Entries.

In the Matter of

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, and its LOCAL 22.

Case No. 2-CB-4148.

Court No. 16,055.

10.28.64	Charge against labor organization or its agents, filed.
12.30.64	Complaint and Notice of Hearing issued. (Marked "Exhibit A" and attached to General Counsel's Motion to strike portions of Petitioners'[1] answer and for judgment on the pleadings.)
1.14.65	Petitioners' answer to the Complaint, received. (Marked "Exhibit B" and attached to General Counsel's Motion to strike portions, etc.)
2. 4.65	General Counsel's Motion to strike portions of Petitioners' answer and for judgment on the pleadings, dated. (Granted, see Trial Examiner's Decision.)
2.25.65	Trial Examiner's Order to Show Cause, dated.
3. 2.65	Petitioners' reply to General Counsel's Motion, received.
3.12.65	Trial Examiner's Order vacating notice of hearing, cancelling hearing and further ordering proceeding be submitted for decision on pleadings, dated.
4. 2.65	Petitioners' letter and brief in opposition to General Counsel's motion, received.
11.22.65	Trial Examiner's Decision issued.
12.14.65	General Counsel's Exceptions to Trial Examiner's Decision, received.

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[1] Petitioners herein were respondents in the Board proceeding.

12.15.65 Petitioner's Exceptions to Trial Examiner's Decision, received.

6.23.66 Decision and Order of the National Labor Relations Board issued.

Complaint and Notice of Hearing.

It having been charged by Edwin D. Holder, herein called Holder, that Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, herein called IUMSWA, and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, herein called Local 22, both at times collectively called Respondents, have engaged in, and are engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.* herein called the Act, the General Counsel of the National Labor Relations Board herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Second Region, pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations—Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The Charge in this proceeding was filed by Holder on October 28, 1964, and served by registered mail upon Respondents on or about October 30, 1964.

2(a) United States Lines Company, herein called U. S. Lines, is and has been at all times material herein a corporation duly organized under, and existing by virtue of, the laws of the State of New Jersey.

(b) At all times material herein, U. S. Lines has maintained its principal office and place of business at One Broadway, in the City and State of New York, where it is, and has been at all times material herein continuously engaged in operating oceangoing vessels in domestic and foreign commerce.

(c). During the past year, which period is representative of its annual operations generally, U. S. Lines, in the course and conduct of its business operations, performed services valued in excess of $50,000, of which services

valued in excess of $100,000 were performed in, and for various enterprises located in, states other than the state wherein it is located.

3. U. S. Lines, is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4(a). Respondents and each of them are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

(b). IUMSWA is and has been at all times material herein the parent International of Local 22.

5. At all times material herein, Local 22 has been recognized by U. S. Lines as the collective bargaining representative of a unit of painters employed by U. S. Lines.

6. At all times material herein, Holder has been employed by U. S. Lines within the unit described above in paragraph 5.

7. At all times material herein, and until June 9, 1964, Holder was a member of Respondents.

8. On February 28, 1964, Holder filed an unfair labor practice charge against Local 22 with the Second Region of the Board, in Case No. 2-CB-3959, alleging that Local 22 violated Section 8(b)(1)(A) and (2) of the Act by causing U. S. Lines to discriminate against him because he had enaged in certain protected activity with respect to his employment by U. S. Lines.

9. On or about April 29, 1964, Local 22 notified Holder, by letter from John Armstrong, President of the Local 22 Trial Board, that on May 13, 1964, a hearing would be held before the Trial Board to determine if there was merit to charges brought against Holder that he violated Local 22's by-laws and the IUMSWA Constitution by filing the unfair labor practice charge described above in paragraph 8.

10. On or about June 8, 1964, at a membership meeting, Local 22 announced through its Executive Board that it had found Holder guilty of the charges set forth above in paragraph 9, and Local 22 thereupon expelled him from membership in Respondents.

11. On or about June 19, 1964, Holder appealed the decision of Local 22, described above in paragraph 10, to the General Executive Board of IUMSWA.

12. On or about October 7, 1964, the General Executive Board of IUMSWA denied Holder's appeal, described above in paragraph 11, and upheld and confirmed his expulsion from membership in Respondents.

13. By the acts described above in paragraphs 9, 10 and 12, and by each of said acts, Respondents restrained and coerced, and are restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

14. The acts of Respondents described above in paragraphs 9, 10, and 12, occurring in connection with the operations of U. S. Lines described above in paragraph 2 and 3, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 15th day of February 1965, at 9:30 a.m., at 745 Fifth Avenue, Fifth Floor in the City and State of New York, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall each file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10 days from the service thereof, and that unless each does so all of the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board.

Dated at New York, New York, this 30th day of December, 1964.

IVAN C. MCLEOD,
Regional Director,
National Labor Relations Board,
745 Fifth Avenue,
New York, N. Y. 10022.

Answer to Complaint.

AND NOW come Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO (hereafter sometimes referred to as "Respondent National Union"), and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO (hereinafter sometimes referred to as "Respondent Local Union", and both of which are hereinafter sometimes referred to as "Respondents"), by M. H. Goldstein, their attorney, and for their answer to the allegations of the same numbered paragraphs of the Complaint issued against them in the above captioned cause, respectfully represent as follows:

1., 2(a) (b) (c), 3., 4(a) (b), 5., 6., 7. Admitted.

8. Admitted with the qualification that the unfair labor practice charge in Case No. 2-CB-3959 was filed by Holder only after he had previously filed with the Respondent Local charges accusing the President of the Respondent Local of violating certain provisions of the Respondent National Union's Constitution, and said charges had resulted in a finding that the Respondent Local's President was innocent of said charges. Thereupon, Holder filed his unfair labor practice charge in Case 2-CB-3959, which was based upon precisely the same facts as those on which his charges against the President of Respondent Local 22 had been based.

9. Admitted. For further answer, Respondents allege that Section 3(A) of Article V, of the Respondent National Union's Constitution, which is binding upon the Respondent Local, provides, in relevant part, as follows:

"Sec. 3. (A) No Union member in good standing in any Local may be suspended or expelled or otherwise disciplined or penalized without a fair and open trial, of which reasonable notice shall be given the accused member, before the Trial Board of the Local Union * * *. The accused member or members or the accusers may appeal the decision of the Local Union's Executive Board to the regular meeting of the General Membership of the Local Union next following the meeting of the Executive Board at which the decision was rendered, and within thirty (30) days after the membership's decision may appeal to the General Executive Board. The General Executive Board shall, after reasonable notice to the appellant of the time and place of hearing, hold a fair and open hearing on such appeal and, not later than 130 days after the first regular meeting of the General Executive Board following receipt of the appeal at the National Office, and in any event not later than the first day of the National Convention, shall render its decision affirming, overruling, or modifying either the findings of guilt or innocence, or the penalty imposed. Both the accused and the accuser shall have the right to file an appeal to the next National Convention by sending such appeal to the National Office of this Union by registered mail not later than thirty days after the decision by the General Executive Board."

Section 5 of Article V, of the Respondent National Union's said Constitution, provides as follows:

"Sec. 5. Every member, Local or subdivision of this Union considering himself, or itself aggrieved by any action of this Union, the G. E. B., a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union."

Accordingly, Holder violated the aforesaid Section 5 by not exhausting the remedies afforded him by the aforesaid Section 3. (A) and by resorting, instead, to the filing of the unfair labor practice charges in Case No. 2-CB-3959 by

reason of his dissatisfaction with the Respondent Local's finding that its President was innocent of the charges which Holder had preferred against said President.

10., 11., 12. Admitted.

13. Respondents deny that they or either of them have by any of the acts described in paragraphs 9, 10, and 12 of the Complant, or by any other acts, restrained and coerced, or are restraining or coercing, any employees in the exercise of the rights guaranteed in Section 7 of the Act, and further deny that they have engaged in or are engaging in any unfair labor practice affecting commerce.

14. Respondents deny that their acts described in paragraphs 9, 10 and 12 of the Complaint, or any other of their acts with respect to Holder, have any connection with the operations of U. S. Lines or have any relation to trade, traffic and commerce among the several states, or lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Wherefore, Respondents request that the Complaint be dismissed.

M. H. GOLDSTEIN,
Attorney for Respondents,
1 E. Penn Square Bldg.,
22nd Floor,
Philadelphia, Pa.

Dated: January 13, 1965.

Motion to Strike Portions of Respondents' Answer and for Judgment on the Pleadings.

On December 30, 1964, upon charges duly filed, the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for the Second Region, issued a Complaint and Notice of Hearing in this proceeding against Respondents, a copy of which marked Exhibit "A", is attached hereto and made a part hereof.

On January 13, 1965, Respondents, by M. H. Goldstein, Esq., their attorney, filed their Answer to said Complaint, a copy of which, marked Exhibit "B", is attached hereto and made a part hereof.

In their Answer Respondents admit all allegations of the Complaint except that they deny the allegations set forth in paragraphs 13 and 14 thereof. The allegations of paragraph 13 consist only of legal conclusions that the acts alleged in other paragraphs of the Complaint which Respondents, as set forth above, have admitted, constitute interference, restrain and coercion of employees in the exercise of rights of Section 7 of the Act, and constitute violations of Section 8(a)(1) of the Act. The allegations in paragraph 14 of the Complaint consist only of legal conclusions that the aforesaid admitted acts of Respondents, in conjunction with the admittedly interstate operations of United States Lines which were also admited, constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

In the paragraphs of their Answer relating to paragraphs 8 and 9 of the Complaint, however, Respondents, after admitting the allegations of said paragraphs, set forth additional allegations of fact which, even if true, would not constitute a defense to the violations alleged in the Complaint.

WHEREFORE, the undersigned Counsel for the General Counsel moves as follows:

1. That an Order be issued prior to the opening of the hearing herein

(a) striking from the two paragraphs of Respondents' Answer relating respectively to paragraphs 8 and 9 of the Complaint everything in each of said paragraphs following the word "Admitted"; and

(b) finding that Respondents have admitted all allegations of paragraphs 1 through 12 of the Complaint herein to be true; and

(c) granting General Counsel judgment on the pleadings.

2. That prior to, and without the necessity of, a hearing the Trial Examiner issue a Trial Examiner's Decision

against Respondents and each of them containing findings of fact and conclusions of law in accordance with the allegations of Complaint herein, and recommending an Order appropriate to remedy the unfair labor practice so found.

3. That General Counsel have such other, further and different relief as may be proper in the premises.

Dated New York, New York, February 4, 1965.

JANET M. STILES,
Attorney, National Labor Relations Board,
745 Fifth Avenue,
New York 22, New York.

To:

George Bokat,
Chief Trial Examiner,
National Labor Relations Board,
Washington 25, D. C.

Edwin D. Holder,
134 Gates Avenue,
Brooklyn, New York.

M. H. Goldstein, Esq.,
One East Penn Sq. Bldg.,
Philadelphia, Pa.

Ralph Katz, Esq.,
120 East 41st Street,
New York, N. Y.

Order to Show Cause.

Counsel for the General Counsel has filed and served upon the Respondents a Motion to Strike Portions of Respondents' Answer and for Judgment on the Pleadings which has been assigned to the undersigned Trial Examiner for ruling thereon. From the pleadings and motion it appears that there may be no genuine issues of fact for

trial, but only issues of law which can be decided on briefs. It there are no factual issues to tried, the Notice of Hearing herein should be vacated and set aside and the parties then be given an opportunity, within a time to be fixed by the undersigned, to file briefs on the legal issues of the case.

Following the usual jurisdictional allegations, the complaint alleges that Respondent Local 22, has been recognized by the U. S. Lines as the bargaining representative of its painters, that Edwin D. Holder has been employed in that unit and was a member of the Respondents until June 8, 1964. The Respondents' answer admits the foregoing allegations of the complaint (Paragraphs 1 through 7).

Paragraph 8 of the complaint alleges that about February 28, 1964, Holder filed unfair labor practice charges against Respondent Local 22, Case No. 2-CB-3959, alleging that it had vioated Section 8(b)(1)(A) and (2) of the Act, by causing U. S. Lines to discriminate against him because he had engaged in certain protected activity. Paragraph 9 alleges that thereafter Respondent Local 22, notified Holder that a hearing would be held before its trial board to determine if there was merit to charges brought against Holder that he violated the Respondents by-laws and constitution by filing the above unfair labor practice charges. The complaint further alleges (paragraphs 10, 11 and 12) that about June 8, 1964, Repondent Local 22, announced Holder had been found guilty of the union charges and expelled from membership in the Union and, on appeal, the General Executive Board of the Respondent International Union confirmed the decision and Holder's expulsion. In their answer the Respondents admit the allegations contained in paragraph 10, 11 and 12, but deny that such acts constitute a violation of the Act as set forth in paragraphs 13 and 14 of the complaint.

The motion herein is directed primarily to the Respondent's answer to paragraphs 8 and 9 of the complaint. In their answer the Respondents admit the allegations contained in paragraph 8, "with the qualification" that Holder did not file his unfair labor practice charges in Case No. 2-CB-3959, until after similar charges against the president of Respondent Local 22, had been filed within the

local and had been dismissed. The answer also admits the allegations of paragraph 9, with the addition that Holder failed to exhaust his internal union remedies prior to his filing the above-mentioned unfair labor practice charges. Therefore, it appears that there may be no genuine issues of fact for trial, but only issues of law which can be decided on briefs.

Accordingly, it is now

ORDERED:

That on or before March 11, 1965, the Respondents file a reply to the Motion to Strike Portions of Respondents' Answer and for Judgment on the Pleadings, stating whether there are any genuine issues of fact open for decision and if so, clearly identifying and stating such issues, and showing cause why the Notice of Hearing should not be vacated and the legal issues resolved by a writen decision after the submission of briefs.

/s/ REEVES R. HILTON,
Trial Examiner.

Dated: February 25, 1965.

Reply of Industrial Union, etc., *et al.*, to General Counsel's Motion to Strike Portion of Respondents' Answer and for Judgment on the Pleadings.

Conformant to the Order to Show Cause issued by Hon. Reeves R. Hilton, Trial Examiner, on February 25, 1965, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, by their attorney, M. H. Goldstein, reserving the right to submit briefs on the legal issue prior to decision of this case, object to the General Counsel's Motion to Strike Por-

tions of Respondents' Answer and for Judgment on the Pleadings, but admit that there are no genuine issues of fact in this case.

M. H. GOLDSTEIN,
Attorney for Respondents.

Telegraphic Order of Trial Examiner Hilton.

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INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA
534 COOPER STREET
CAMDEN, NEW JERSEY

LOCAL 22, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA
464 WEST 23rd STREET
NEW YORK CITY, NEW YORK

UNITED STATES LINES COMPANY
ONE BROADWAY
NEW YORK CITY, NEW YORK

MR. EDWIN D. HOLDER
134 GATES AVENUE
BROOKLYN, NEW YORK

RE: INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS, *ET AL.* (U. S. LINES COMPANY) CASE NO. 2-CB-4148. PURSUANT TO AN ORDER TO SHOW CAUSE ISSUED BY ME ON FEBRUARY 25, 1965, RETURNABLE MARCH 11, 1965, COUNSEL FOR THE RESPONDENTS FILED A REPLY, RECEIVED MARCH 2, WHEREIN THE RESPONDENTS GENERALLY OPPOSE THE GENERAL COUNSEL'S MOTION TO STRIKE AND FOR JUDGMENT ON THE PLEADINGS BUT ADMIT THERE ARE NO GENUINE ISSUES OF FACT TO BE TRIED IN THIS CASE. SINCE THERE ARE NO ISSUES OF FACT RAISED BY THE PLEADINGS REQUIRING A HEARING BEFORE A TRIAL EXAMINER AS A BASIS FOR THE ISSUANCE OF A TRIAL EXAMINER'S DECISION, IT IS NOW, UPON THE PLEADINGS AND THE MOVING PAPERS: ORDERED, THAT THE NOTICE OF HEARING OF DECEMBER 30, 1964, BE, AND IT HEREBY IS, VACATED, AND THE HEARING SCHEDULED FOR MARCH 15, 1965, BE, AND IT HEREBY IS, CANCELLED. IT IS FURTHER ORDERED THAT THIS PROCEEDING BE, AND IT HEREBY IS, DEEMED TO BE SUBMITTED FOR DECISION ON THE PLEADINGS, THE GENERAL COUNSEL'S MOTION AND THE RESPONDENT'S REPLY THERETO. ALL THE PARTIES ARE ADVISED OF THEIR RIGHT TO FILE BRIEFS, TO BE SUBMITTED TO ME ON OR BEFORE APRIL 2, 1965.

REEVES R. HILTON, TRIAL EXAMINER

2 2
3/12/65 12:15 p.m.

Trial Examiner's Decision on Motion for Judgment on the Pleadings.

STATEMENT OF THE CASE

Upon a charge filed October 28, 1964, by Edwin D. Holder, an individual, against Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, herein called IUMSWA, and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, herein called Local 22, the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for the Second Region, issued his complaint, dated December 30, 1964, alleging violation by each of the forenamed Respondents of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act. The Respondents jointly filed an answer admitting the factual allegations of the complaint but denying that their conduct complained of was violative of the Act. The answer defensively asserts certain additional facts.

On February 4, 1965, the General Counsel filed a motion to strike portions of the answer and for entry of judgment on the pleadings. The motion contended, in effect, that no litigable issue of fact was raised by the answer requiring a hearing for the taking of evidence and that the Respondents' liability in the case is established by the admissions contained in the answer. That motion, together with the General Counsel's supporting memorandum, was referred for ruling to Trial Examiner Reeves R. Hilton. On February 25, 1964, Trial Examiner Hilton issued and caused to be served on the Respondents an order requiring them to show cause why the motion should not be granted. The Respondents were specifically directed to note in their response "whether there were any genuine issues of fact open for decision and, if so, clearly identifying and stating such issues." On March 2, 1965, Trial Examiner Hilton received a reply to this order from the Respondents in which they admitted "there are no genuine issues of fact in this case" but stated their objection to the granting of the motion.

On March 12, 1965, Trial Examiner Hilton informed the parties that in view of the Respondents' admissions

that there were in this case no genuine issues of fact to be tried there was consequently no hearing required before issuance of his decision in the case on the merits. He thereupon ordered the hearing date, previously scheduled, to be vacated and further ordered that the proceeding be submitted for decision on the pleadings and afforded the parties opportunity to file briefs. Subsequently Trial Examiner Hilton received from the General Counsel a supplemental memorandum in behalf of the motion and from the Respondents a brief opposing the motion and a letter answering the General Counsel's supplemental memorandum.

Trial Examiner Hilton died before issuance of his decision in the case. Thereafter, the Board, pursuant to provisions of the Administrative Procedures Act and its own Rules and Regulations, requested the Chief Trial Examiner to designate another Trial Examiner in the proceeding in place of Trial Examiner Hilton. On October 12, 1965, I received such designation.

On the basis of the record before me, including the rulings by Trial Examiner Hilton, I make the following:

FINDINGS OF FACT

I. COMMERCE FACTS

The complaint alleges and the answer admits that United States Lines Company, herein called U. S. Lines, is a New Jersey corporation maintaining a principal office and place of business in New York City where it has been engaged in operating ocean going vessels in domestic and foreign commerce. During the year preceding issuance of the complaint U. S. Lines performed services valued in excess of $100,000 for various enterprises located in States other than New York. I find from the foregoing facts that U. S. Lines is engaged in interstate commerce within the meaning of the Act and that the Act's purposes will be effectuated by the Board's assertion of jurisdiction in this case over its operations.

II. The Labor Organizations Involved

IUMSWA and Local 22 are labor organizations within the meaning of the Act. IUMSWA is the parent International of Local 22.

III. The Unfair Labor Practices

The Respondents' alleged violation of Section 8(b)(1)(A) is based on their expulsion from membership in their organizations of charging party Holder because he had filed an unfair labor practice charge against Local 22 with the Board's Regional Office. The answer admits the essential facts pleaded by the complaint but denies that these facts constitute unlawful conduct. These are the facts, in addition to those above stated, established by the pleadings:

(a) Local 22 has at all times material been recognized by U. S. Lines as the collective bargaining representative of a unit of its painters.

(b) At all times material Holder was employed by U. S. Lines within the foregoing unit.

(c) At all times material and until June 9, 1964, Holder was a member of both Local 22 and IUMSWA.

(d) On February 28, 1964, Holder filed an unfair labor practice charge against Local 22 with the Board's Second Regional Office in Case No. 2-CB-3959 alleging that Local 22 had violated Section 8(b)(1)(A) and (2) of the Act by causing U. S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U. S. Lines.

The answer expressly admits the facts related in the foregoing paragraph but defensively pleads certain other facts which the General Counsel has moved to strike as irrelevant. These are the assertions in the answer:

> "* * * the unfair labor practice charge in Case No. 2-CB-3959 was filed by Holder only after he had previously filed with Local 22 charges accusing the president of Local 22 of violating certain provisions of the IUMSWA constitution and said charges had resulted in a finding that the president was innocent

of said charges. The unfair labor practice charge filed by Holder in Case No. 2-CB-3959 was based on the same facts as those on which his charges against Local 22's president had been based."

(e) On or about April 29, 1964, Holder was notified by letter from Local 22's president that on May 13, 1964, a hearing would be held before Local 22's Trial Board to determine whether there was merit to charges brought against Holder that he had violated Local 22's by-laws and the IUMSWA constitution by filing the unfair labor practice charge in Case No. 2-CB-3959.

The answer expressly admits this allegation but defensively pleads certain other facts which the General Counsel has also moved to strike as irrelevant: The answer quotes the provisions of the IUMSWA constitution, binding on Local 22, pertaining to procedures for expulsion of members, and the constitutional provision compelling members aggrieved by any action of IUMSWA, its constituent locals or officers, to exhaust all remedies and appeals provided by the constitution before resorting to any outside court or tribunal. The answer asserts Holder violated the foregoing constitutional provision by the filing of a charge in Case No. 2-CB-3959 and attributes this action to his dissatisfaction with the finding by Local 22 that its president was innocent of the charges Holder had preferred against him.

(f) On or about June 8, 1964, at a membership meeting Local 22 announced through its Executive Board that it had found Holder guilty of the foregoing charges of violation of the Respondent's by-laws and constitution and thereupon Local 22 expelled him from membership in the Respondents.

(g) On or about June 19, 1964, Holder appealed the foregoing decision by Local 22 to the General Executive Board of IUMSWA and on or about October 7, 1964, that board denied Holder's appeal and upheld and confirmed his expulsion from membership in the Respondents.

The General Counsel relies upon the Board's decisions in *Skura*, 148 NLRB No. 74, *Wellman-Lord*, 148 NLRB No. 81 and *Tawas Tube*, 151 NLRB No. 9, to support the contention that the Respondents violated Section 8(b)

(1) (A) of the Act by Holder's expulsion from membership. The Respondents contend that the facts of the instant case are distinguishable from those in *Skura* and *Wellman-Lord* and that the Board's holdings in those cases are not here applicable. The Respondents further argue that the Board incorrectly decided *Skura* and that its holding should not therefore here be applied. Concerning *Tawas Tube*, the Respondents contend that the Board's holding therein supports the defense rather than the General Counsel's case.

In *Skura* a member (Skura) of the union involved in the case had filed an unfair labor practice charge with the Board's Regional Office against the union claiming its discriminatory refusal to refer him to available employment. The Regional Director thereafter notified Skura of his decision not to issue a complaint based on the charge, whereupon Skura withdrew the charge. Subsequently charges were preferred against *Skura* by the union's official claiming that he had violated the union's by-laws when he filed the unfair labor practice charge. These by-laws, like the by-laws in the instant case, compelled aggrieved members to exhaust all means provided by the constitution of the union's parent International before resorting to "any civil or other action." Although notified, *Skura* did not appear before the union's grievance committee for the hearing on the charge against him, was tried *in-absentia*, was found guilty of violating the foregoing constitutional provision and was fined $200. His subsequent tender of union dues was refused because the union's by-laws forbade acceptance of dues from members who had fines outstanding.

The Board held that the Union had violated Section 8(b) (1) (A) of the Act by fining *Skura* in the foregoing circumstances. It declared that the Act confers upon any person the right to file an unfair labor practice charge, that a fine is by nature coercive, and, hence, that the union's imposition of the fine against *Skura* for filing a charge with the Board was violative of his statutory rights. The Board concluded that the union had violated the Act by its conduct notwithstanding the union's rule prohibiting aggrieved members from resorting to external

procedures before exhausting internal union means for remedy of grievances.

Wellman-Lord was a companion case and was issued by the Board on the same day with its decision in *Skura*. The *Wellman-Lord* facts are essentially like those of *Skura* and the holdings in both cases are identical.

The *Tawas-Tube* decision was issued by the Board in the context of a representation proceeding. An issue in the case involved the union's expulsion from membership of two members one of whom had filed a petition to decertify the union as collective bargaining representative of the employees of the employer in the case. The other employee had with the first supported the decertification cause. While the election in the decertification proceeding was pending, these employees were notified by the union's president that they were to be tried by the union for violation of a provision of the parent International's constitution creating the offense of

> advocating or attempting to bring about the withdrawal from the International Union of any Local Union or any member or group of members.

The two employees were thereafter tried by a committee of their union's members and were expelled for their activities. The issue resulting from this action was whether the election in the decertification proceeding should be set aside on the ground that the expulsions restrained or coerced unit employees. The Regional Director concluded that under *Skura* the Union's conduct was an unfair labor practice and that the election should be set aside. The Board disagreed.

The Board construed the proviso to Section 8(b)(1)(A)[1] of the Act to exclude the foregoing union conduct from the proscriptions of that section. The expulsions were regarded by the Board as "appropriate union disciplinary action under the circumstances." Noting that *Skura* was not a controlling precedent, the Board empha-

[1] The proviso states that the language of Section 8(b)(1)(A) "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

sized that it had, in deciding the *Skura* case, "limited the scope of union disciplinary action generally allowable under the terms of Section 8(b)(1)(A)'s proviso because of the importance of safeguarding prompt and unimpeded access to the Board's processes by employees complaining of union infringement of their statutory rights. We held that in light of this overriding policy it was beyond the competence of the Union to enforce its rule by coercive means and thus deter employees from resorting to Board processes in such circumstances."

It is clear that the *Tawas Tube* decision does not disturb the Board's *Skura* holding. Union discipline which coerces members is still unlawful when administered to punish employees who file unfair labor practice charges with the Board seeking redress of their grievances against a union or its officials, and it is immaterial to this holding that the charges were filed with the Board in contravention of the union's constitutional or by-law provisions compelling exhaustion of internal union procedures before resort to the Board's processes. Application of these governing Board principles to the facts of the instant case compels the conclusion that by the expulsion of Holder for membership because he had filed unfair labor practice charges against Local 22 with the Board's Regional Office in Case No. 2-CB-3959 the Respondents violated Section 8(b)(1)(A) of the Act.

In reaching the foregoing conclusion I accord no merit to the contention in the Respondents' letter answering the General Counsel's Supplemental Memorandum that the Board's *Tawas Tube* holding should be construed to mean that an expulsion from membership, unlike the imposition of a fine, has no coercive effect upon employees in the exercise of statutory rights. There is no support in *Tawas Tube*, or in logic, for this generalization. Although the Board in *Tawas Tube* regarded the expulsion of employees who were seeking the union's decertification as an ineffective deterrent against resorting to the Board's processes, it said this while underscoring the fact that "loss of membership was of no significance" to these employees. This is not true in Holder's case. There is no indication that continuation of his membership in the Respondents

meant nothing to him. To the contrary, this very proceeding, initiated by Holder's filing of unfair labor practice charges against the Respondents for his expulsion, shows positively that his membership was significant to him. Further, I have no doubt that, if, as the Board said in *Skura*, "a fine is by nature coercive", an expulsion from membership even more effectively coerces employees. The ultimate penalty associated with the imposition of a fine is loss of membership in the union which may be avoided by payment of the fine. Expulsion from membership leaves no room for grace. The ultimate penalty, with loss of benefits inherent in union membership including a voice in the democratic decisions of the organization materially affecting the welfare of members, is immediate and final.

Having concluded from the facts established by the pleadings that the Respondents have violated Section 8(b)(1)(A) of the Act, the General Counsel's motion for judgment on the pleadings is granted. There is, accordingly, no need to pass on the General Counsel's motion to strike portions of the Respondents' answer.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in section III, above, occurring in connection with the operations of U. S. Lines, described in section I, above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondents have engaged in unfair labor practices violative of Section 8(b)(1)(A) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. United States Lines Company is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By expelling Edwin D. Holder from membership in their organizations because Holder had filed unfair labor practice charges with the Board without first exhausting his internal union remedies, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this proceeding I recommend that Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, their officers, agents, and representatives shall:

1. Cease and desist from:

(a) Expelling employees from membership in their organizations because they have filed unfair labor practice charges with the Board against them or their officials without first exhausting their internal union remedies.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed employees in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Reinstate to membership in their organizations Edwin D. Holder without any loss of status as a member resulting from his expulsion.

(b) Post at their business offices and at all other places where notices to members are customarily posted, in conspicuous places, copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by official representatives of the Respondents, be posted by the Respondents immediately upon receipt thereof and maintained by them for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Second Region in writing within 20 days from the receipt of this Decision and Recommendations what steps they have taken to comply therewith.[3]

Dated at Washington, D. C., Nov. 22, 1965.

THOMAS N. KESSEL,
Trial Examiner.

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[2] In the event that these Recommendations shall be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[3] In the event that these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Second Region in writing within 10 days from the date of receipt of this Order what steps the Respondents have taken to comply herewith."

NOTICE

TO ALL MEMBERS OF INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO AND LOCAL 22, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO (UNITED STATES LINES COMPANY)

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT

We hereby notify you that:

WE WILL NOT expel employees from membership in our organizations because they have filed unfair labor practice charges with the National Labor Relations Board against us or our officials without first exhausting their internal union remedies.

WE WILL reinstate Edwin D. Holder to membership in our organizations without loss of any status as a member because of our expulsion of Holder from membership.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

LOCAL 22, INDUSTRIAL UNION OF MARINE AND SHIFBUILDING WORKERS OF AMERICA, AFL-CIO (UNITED STATES LINES COMPANY)
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 5th Floor Squibb Building, 745 Fifth Avenue, New York, New York 10022 (Tel. No. 751-5500).

Decision and Order.

On November 22, 1965, Trial Examiner Thomas N Kessel issued his Decision in the above-entitled proceedings, finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondents and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the modifications noted herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommendations of the Trial Examiner, as modified below, and hereby orders that the Respondents, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommendations, as herein modified:

1. Delete from paragraph 1(a) of the Trial Examiner's Recommendations, and from the first paragraph of

[1] In this connection and for a detailed discussion of the issues presented by this case, see the recently issued case of *Van Camp Sea Food Co., Inc.*, 159 NLRB No. 47.

the Appendix attached to the Trial Examiner's Decision the last line beginning with the words, "without first exhausting * * *."

2. Substitute for paragraph 2(a) the following:

"(a) Upon request, reinstate Edwin D. Holder to membership in their organizations without requiring payment of back dues for the period of his expulsion, except for that portion of his dues which is shown at the compliance stage to be regularly allocable to the cost of insurance premiums, pension contributions and other welfare benefits accruing to Respondents' members; to the extent that benefits such as life insurance, health, and medical insurance and benefits and the like cannot be made retroactively for Holder, Respondents shall reimburse Holder for any expenses or losses, with interest thereon at 6 percent per annum, suffered as a result of the absence of such benefits, less the proportion of Holder's dues which would have been allocable to the payment of premiums for or other purchase of such benefits."

3. Substitute for the second indented paragraph of the attached "Appendix" the following:

WE WILL reinstate EDWIN D. HOLDER, upon application, to membership in our organizations without loss of any status as a member because of our expulsion of Holder from membership, and we will reimburse him, with interest thereon, for any losses or expenses suffered because of the absence of certain benefits during the period of his expulsion in accordance with a Decision and Order of the National Labor Relations Board.

Dated, Washington, D. C., Jun. 23, 1966.

FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
HOWARD JENKINS, JR.,
Member,
(SEAL) National Labor Relations Board.

FORM NLRB-508 (2-6C)

Form Approved Budget Bureau No. 64-R003.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: *File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.*

DO NOT WRITE IN THIS SPACE

CASE NO. 2-CB-4148

DATE FILED 10-28-64

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

NAME
INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO and its LOCAL NO. 22

ADDRESS *(Street, City, State and ZIP Code)*
(1) 534 Cooper Street, Camden 2, New Jersey
(2) Local 22 - 464 West 23rd Street, New York, New York

THE ABOVE-NAMED ORGANIZATION(S) OR ITS AGENTS HAS (HAVE) ENGAGED IN AND IS (ARE) ENGAGING IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(b) SUBSECTION(S) (1)(A) *(List subsections)* OF THE NATIONAL LABOR RELATIONS ACT, AND THESE UNFAIR LABOR PRACTICES ARE UNFAIR LABOR PRACTICES AFFECTING COMMERCE WITHIN THE MEANING OF THE ACT.

2. BASIS OF THE CHARGE *(Be specific as to facts, names, addresses, plants involved, dates, places, etc.)*

On or about October 7, 1964, the above-named labor organization, by its officers, agents and representatives, terminated the membership of the Charging Party in said labor organizations because he filed charges under the Act in the matter of United States Lines and Local 22, Industrial Union of Marine Shipbuilders of America, AFL-CIO, Case Nos. 2-CA-9851 and 2-CB-3959.

Since on or about October 7, 1964, by the act set forth in the paragraph above, and by other acts and/or conduct, the above-named labor organization and its agents have restrained and coerced and continue to restrain and coerce the Charging Party in the exercise of rights guaranteed in Section 7 of the Act.

3. NAME OF EMPLOYER
UNITED STATES LINES

4. LOCATION OF PLANT INVOLVED *(Street, City, State, and ZIP Code)*
One Broadway
New York, New York

5. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*	6. IDENTITY PRINCIPAL PRODUCT OR SERVICE	7. NO. OF WORKERS EMPLOYED
Steamship Line		5,000

8. FULL NAME OF PARTY FILING CHARGE
EDWIN D. HOLDER

9. ADDRESS OF PARTY FILING CHARGE *(Street, City, State and ZIP Code)*
134 Gates Avenue
Brooklyn, New York

10. TEL. NO.
MA 2-2882

11. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

BY /s/ Edwin D. Holder
(Signature of representative or person making charge)
EDWIN D. HOLDER
An Individual
(Title or office, if any)

October 28, 1964
(Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

Delson & Gordon, Esqus.
120 E. 41st Street, NYC - Att: Ralph Katz, Esq.

GPO 869-535

Form NLRB-501 (4-62)

Form approved Budget Bureau No. 64-R011

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 2-CA-9851

Date Filed 2-28-64

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

Name of Employer: UNITED STATES LINES

Number of Workers Employed: Several thousands

Address of Establishment (Street and number, city, zone, and State): 1 Broadway, New York, N.Y.

Type of Establishment (Factory, mine, wholesaler, etc.): Ship owners

Identify principal product or service: Sea and ocean transportation

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about October 8, 1963 the above named Employer discriminated against Edwin D. Holder in the assignment and distribution of work because of his activities on behalf of Local 22, Industrial Union of Marine Ship-Builders of America, AFL-CIO.

By these and other acts, the above named Employer has interfered with, restrained and coerced, and continues to interfere with, restrain and coerce its employees in the exercise of rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number)

Edwin D. Holder

4. Address (Street and number, city, zone, and State): 134 Gates Ave., Brooklyn, N.Y.

Telephone No.: TA 2-2682

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Edwin D. Holder
(Signature of representative or person filing charge)

February 28, 1964
(Date)

Edwin D. Holder
an individual
(Title, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

U.S. GOVERNMENT PRINTING OFFICE 1963—O-649170

GPO 999025

FORM NLRB-508 (12-62)

Form Approved
Budget Bureau No. 69-R003.1

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: *File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.*

DO NOT WRITE IN THIS SPACE

CASE NO. 2-CB-3959
(2-CA-9851)

DATE FILED 2-28-64

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

NAME
LOCAL 22, INDUSTRIAL UNION OF MARINE SHIP-BUILDERS OF AMERICA, AFL-CIO

ADDRESS (Street, City, State and ZIP Code)
464 West 23 St., New York, N.Y.

THE ABOVE-NAMED ORGANIZATION(S) OR ITS AGENTS HAS (HAVE) ENGAGED IN AND IS (ARE) ENGAGING IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(b) SUBSECTION(S) (1)(A) and (2) (List subsections) OF THE NATIONAL LABOR RELATIONS ACT, AND THESE UNFAIR LABOR PRACTICES ARE UNFAIR LABOR PRACTICES AFFECTING COMMERCE WITHIN THE MEANING OF THE ACT.

2. BASIS OF THE CHARGE (*Be specific as to facts, names, addresses, plants involved, dates, places, etc.*)

On or about October 8, 1964, the above named labor organization caused the United States Lines to discriminate against Edwin D. Holder because he engaged in concerted activities with respect to the conditions of his employment.

By these and other acts, the above named labor organization has interfered with, restrained and coerced, and continues to interfere with, restrain and coerce the Company's employees in the exercise of rights guaranteed in Section 7 of the Act.

3. NAME OF EMPLOYER
United States Lines

4. LOCATION OF PLANT INVOLVED (Street, City, State, and ZIP Code)
Pier 62, New York, N.Y.

5. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)	6. IDENTIFY PRINCIPAL PRODUCT OR SERVICE	7. NO. OF WORKERS EMPLOYED
Pier	Ship Maintenance	250

8. FULL NAME OF PARTY FILING CHARGE
Edwin D. Holder

9. ADDRESS OF PARTY FILING CHARGE (Street, City, State and ZIP Code)
134 Gates Avenue, Brooklyn, N.Y.

10. TEL. NO.
MA 2-2882

11. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

BY /s/ Edwin D. Holder
(Signature of representative or person making charge)

February 28, 1964
(Date)

Edwin D. Holder
an individual
(Title or office, if any)

WILFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001.)

GPO 889-531

NATIONAL LABOR RELATIONS BOARD

SECOND REGION

[NLRB SEAL]

745 Fifth Avenue

New York 22, New York Telephone Plaza 1-5500

May 20, 1964

Mr. Edwin D. Holder
134 Gates Avenue
Brooklyn, N. Y.

Re: United States Lines
Case No: 2-CA-9851

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it appears that, because there is insufficient evidence of any violation of the Act, further proceedings are not warranted at this time.

The evidence adduced in the investigation does not support your charge alleging that the above-named company discriminated against you because of your union or other concerted activities. Aside from the questions raised concerning whether your charge was timely filed and served, a question not here determined, it appears that the company decided to cut down on the number of chargemen employed and that you lost employment as such chargeman only for that reason and not for any other reason prohibited by the Act. Further, the evidence does not tend to establish that the company violated the Act in any other manner encompassed by the charge. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19) you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board. Washington 25, D. C., and a copy with me. This

request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D. C. by the close of business on June 2, 1964. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file.

Very truly yours

IVAN C. MCLEOD
Regional Director

REGISTERED MAIL
R.R.R.

CC: General Counsel NLRB,
Washington 25, D. C.

United States Lines, 1 Broadway, New York, N. Y.
Local 22, Industrial Union of Marine Shipbuilders of America, AFL-CIO, 464 West 23rd Street, New York, N. Y.
Kirlin, Campbell & Keating, Esqs. Att: James A. Herbert, Esq., 120 Broadway, N. Y.
Burton H. Hall, Esq., 136 Liberty Street, New York, N. Y.

NATIONAL LABOR RELATIONS BOARD
SECOND REGION

[NLRB SEAL]

745 Fifth Avenue

New York 22, New York Telephone Plaza 1-5500

May 20, 1964

Mr. Edwin D. Holder
134 Gates Avenue
Brooklyn, N. Y.

Re: Local 22, Industrial Union of Marine Shipbuilding of America, AFL-CIO (United States Lines)

Case No: 2-CB-3959

Dear Sir:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it appears that, because there is insufficient evidence of any violation of the Act, further proceedings are not warranted at this time.

The evidence adduced in the investigation does not support your charge that the above-named labor organization caused United States Lines to discriminate against you. No evidence has been disclosed which tends to establish that any union representative played any part in the company's decision not to utilize you as a chargeman or that the union or any of its representatives acted unlawfully in refusing to process a grievance respecting the company's action. Further the evidence does not tend to establish that the union violated the Act in any other manner encompassed by the charge. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19) you may obtain a review of this action by filing a request for such review

with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request must be received by the General Counsel in Washington, D. C. by the close of business on June 2, 1964. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file.

Very truly yours

IVAN C. MCLEOD
Regional Director

REGISTERED MAIL
R.R.R.

CC: General Counsel NLRB,
Washington 25, D. C.

Local 22, Industrial Union of Marine Shipbuilding of America, AFL-CIO, 464 West 23rd Street, New York, N. Y.
United States Lines, 1 Broadway, New York, N. Y.
Kirlin, Campbell & Keating, Esqs., 120 Broadway, New York, N. Y. Attn: James A. Herbert, Esq.
Burton H. Hall, Esq., 136 Liberty Street, New York, N. Y.

United States Court of Appeals for the Third Circuit

No. 16055

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of an Order of the National Labor Relations Board

Argued March 29, 1967

Before: HASTIE and SEITZ, *Circuit Judges*, and BODY, *District Judge*

OPINION OF THE COURT

(Filed June 22, 1967)

By HASTIE, *Circuit Judge.*

On the petition of an international union and one of its locals for the review of an unfair labor practice decision and order, 159 NLRB No. 95, and a cross-petition of the National Labor Relations Board for enforcement of the order, we here consider the merits of the Board 's so-called *Skura* rule, as recently adopted in *Local 138, International Union of Operating Engineers and Charles S. Skura*, 1964, 148 N.L.R.B. 679, and sanctioned by the Court of Appeals for the District of Columbia in *Roberts* v. *N.L.R.B.*, D.C. Cir., 1965, 350 F. 2d 427.

The alleged unfair labor practice in this case is the union's conduct in discharging Edwin Holder from union membership because he had filed with the Board an unfair labor practice charge against the local and its president without first exhausting prescribed and available remedies within the labor organization.

Holder had filed intra-union charges with his local, alleging that the local president had wrongfully caused Holder's

employer to discriminate against him because of "certain legally protected activity". Except for the quoted phrase, the present record does not disclose details or even the substance of Holder's complaint. The local considered and dismissed these charges. The International Constitution of the union provided for an appeal from the decision of a local to the General Executive Board of the International. It also required that any member "aggrieved by any action of * * * a local * * * shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union". Disregarding this requirement and without taking any intra-union appeal from the local's decision, Holder filed with the Board an unfair labor practice charge against the local, alleging the same conduct of which he had unsuccessfully complained to the local. Here again, the present record fails to specify the details of that conduct. The General Counsel refused to issue a complaint and the unfair labor practice charge was dismissed.

Shortly thereafter, Holder was charged before the trial board of his local with violation of the above cited provision of the International Constitution. He was found guilty and expelled from membership. He then appealed to the General Executive Board of the International which confirmed his expulsion.

Holder next initiated the present unfair labor practice proceeding, charging that the labor organization had violated section 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(A), by coercing him in the exercise of rights guaranteed by section 7 of the Act. Applying the *Skura* rule, the Board found a violation as charged and issued the unfair labor practice order which is now before us.

Section 8(b)(1)(A) reads in pertinent part as follows:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules

with respect to the acquisition or retention of membership therein * * *."

Thus, the only rights which this subsection protects are those contained in section 7, which reads in its entirety as follows:

> Employees shall have the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Accordingly, our first inquiry is whether section 7 protects an employee's asserted right to complain to the Board of his union's alleged unfair interference with his "legally protected activity" without first exhausting his remedy within the union as required by the union's constitution.

It will be observed that section 7 says nothing about any right to file charges with the Board. That section is concerned exclusively with an employee's freedom to unionize, to bargain collectively, and to engage in other concerted activities, as well as the concomitant freedom to refrain from participating in such organized or concerted activity. These freedoms are, by necessary implication, attended by a remedial right of the employee to charge coercive abridgement of them in an unfair labor practice proceeding before the Board. Thus, a section 8(b)(1)(A) unfair labor practice can be established here by showing that rights incidental to organization or bargaining were the basis of Holder's complaint which led to punitive union action, and in no other way.

It is argued here, as it was in the *Roberts* and *Skura* cases that section 7 protects the employee's freedom to complain to the Board of union misconduct regardless of the foundation for the charge. But as we have just pointed out, if any respect is to be accorded the language

of section 7, its protection of the right to file charges must be limited to complaints that the union has in some way interfered with the sort of activity that is described in that section. It may be that Holder's complaint was of such a breach of the union's duty to represent the employee fairly as the Court of Appeals for the Fifth Circuit recently found to be inherent in the collective bargaining process protected by section 7.. *Local Union No. 12, United Rubber, C.L.&P. Workers* v. *NLRB*, 5th Cir., 1966, 368 F. 2d 12. But this record contains no facts and no analysis by the Board upon the basis of which we can judge whether any type of violation of section 7 is involved here.

The *Skura* decision itself, which is indistinguishable from and followed in this case, is similarly lacking in any showing of how that controversy involved the subject matter of section 7. Only a few months earlier, in the so-called *Wisconsin Motor case, Local 283, UAW*, 1964, 145 NLRB 1097, the Board, after reviewing pertinent legislative history, had ruled that it had "not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee". 145 NLRB at 1104. In the *Skura* case, the Board recognized its Wisconsin Motor "opinion that the Act did not vest it with authority to police the internal discipline of a union short of job discrimination". 148 NLRB at 682. Hard put to distinguish the two cases factually, the Board announced and relied upon its view that "overriding public interest" required that a union not be permitted to discipline an employee in an effort to "limit access to the Board's processes". To that end, it apparently read into section 7, without any stated justification, a general right of access to the Board, unlimited by any requirement that the particular controversy involve organizational rights or rights inherent in collective bargaining.

In the *Roberts* case, the Court of Appeals said "we assume, and petitioners agree, as stated in their brief, that 'the right of an employee to file charges is protected under section 7' ". 350 F. 2d at 428. But the court seems not to have considered what we have attempted to demon-

strate, that in order for the right to file particular charges to be protected by section 7, the charges themselves must assert misconduct which, if proved, would constitute a deprivation of rights declared in that section.

The *Roberts* opinion also points out that section 8(a)(4) expressly makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges" under the Act. From this the court seems to imply that a union should be treated in the same manner and that Congress must have so intended. But while the Taft-Hartley Act undoubtedly undertook to impose many responsibilities upon unions equivalent to the responsibilities of employers under the original Wagner Act, we find no basis for concluding that whatever had been required of the one is now implicitly required of the other. Indeed, included in the Taft-Hartley bill as it passed the House was a provision, section 8(c)(5), which stipulated that punitive action by a union against a member for filing charges against the union or otherwise taking issue with it constituted an unfair labor practice. 1 Leg. Hist. L.M.R.A. 53-54. But the conference committee deleted this section and the bill was enacted without it. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 46, U.S. Code Cong. Service 1947, 1135. Thus, it was not by inadvertence that Congress failed to include in the Taft-Hartley Act a general section explicitly protecting union members who filed charges against their unions from union reprisals.

In this area of Taft-Hartley Act restrictions on union conduct, imposed as "the result of conflict and compromise between strong contending forces", the Supreme Court has counseled "wariness in finding by construction a broad policy against" a type of conduct "when * * * it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law". *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 1958, 357 U.S. 93, 99-100. Mindful of this admonition and its pertinence to the present issue, we think neither the board nor a court can properly employ its views of public policy as justification for engrafting upon section 7 a general right of unlimited access to the Board, the declaration of which the Congress considered but chose to withhold.

In these circumstances, if there were no other error in the Board's decision, we would remand the cause for reconsideration and further showing whether and how section 7 rights are involved in Holder's original complaint. However, there are other considerations which require that the Board's decision be set aside.

We have not heretofore discussed the proviso of section 8(b)(1)(A), "that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." We think that proviso protects the union's action in this case.

We agree with the Board that the proviso does not enable a union to promulgate any rule it desires and hinge membership upon adherence. For example, a union rule which subjected a member to dismissal or other disciplinary action for filing charges with the Board against the union alleging conduct which, if proved, would constitute an unfair labor practice within some provision of the Act, would frustrate the operation of the Act and thus, by logical implication, be outside of the protection of the proviso. Here, however, the union rule in question required only that the union be given a fair opportunity to correct its own wrong before the injured member should have recourse to the Board. We do not see how such a rule offends public policy or impedes the normal and proper administration of the Act. Indeed, to the extent that such a rule relieves the Board of the unnecessary burden of grievances that can be settled within a union, it serves the purposes of the Act well. On the other hand, the member's right to charge his union before the Board is not detrimentally affected by requiring that the exercise of that right be postponed until after a practical and reasonable resort to internal remedies as provided by the union. *Cf. Harris* v. *International Longshoremen's Assn., Local 1291*, 3d Cir., 1963, 321 F. 2d 901. Of course, a court or an administrative agency will determine for itself whether the alleged intra-union remedy is in fact available and whether resort to it would impose unreasonable delay or hardship upon the complainant.

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4), both

confirms our view of the impact of public policy in a situation such as this and makes it mandatory that the *Skura* rule be rejected and the Board's action in this case set aside. Section 101(a)(4) appears in that part of the 1959 Act which is entitled "Bill of Rights of Members of Labor Organizations". It provides that "no labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * *. *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations * * *."

It will be observed that the subsection applies to proceedings "before any administrative agency", thus covering the present proceeding before the National Labor Relations Board. Indeed, the introductory section of the 1959 Act recites as one of its purposes the correction of union and management practices "which distort and defeat the policies of the" Taft-Hartley Act. But in applying the statute's general prohibition of union action restricting the right of a member to institute a proceeding before an administrative agency, the Board is equally obligated to respect the attending proviso, "that any such member may be required to exhaust reasonable hearing procedures * * * within such organization * * *."

To avoid the impact of this proviso, the Board argues that the proviso does not say who may require the union member to exhaust internal hearing procedures and then reaches the surprising conclusion that it is the Board, rather than any labor organization, that is authorized by Congress to require that a union member resort to reasonable intra-union procedures. We think this construction does violence to the structure and the sense of section 101. That section is entitled, "Bill of rights; constitution and by-laws of labor organizations". It consists of a number of provisions prescribing what unions may and may not do and require in the conduct of their affairs and in the treatment of their members. The general prohibition in the subsection here in question is expressly directed against labor organizations. Logically, and in normal

reading, the attendant and qualifying proviso is an exception stating what such an organization may do despite the preceding general restriction upon its action. Moreover, there is no need for a proviso to authorize a court or an administrative body to postpone its action until a litigant shall exhaust intra-union remedies, since judicial and quasi-judicial bodies frequently exercise such discretionary power to postpone their own action pending the exhaustion of other remedies as a matter of inherent right without benefit of legislation.

For these reasons we hold, as has been said in a concurring opinion in one of our earlier decisions, that this subsection means "that a union may not restrict a member's resort to the courts except that it may require that the member first devote not more than four months to reasonable grievance procedures within the organization".[1] See *Sheridan* v. *United Brotherhood of Carpenters, Local 626*, 3d Cir., 1962, 306 F. 2d 152, concurring opinion of Hastie, J., at 160. But *cf. Detroy* v. *American Guild of Variety Artists*, 2d Cir., 1961, 286 F. 2d 75, *cert. denied* 366 U.S. 929. It follows that in administering the National Labor Relations Act, the Board may not make the union's conduct in this case an unfair labor practice because section 101(a)(4) of the Labor-Management Reporting and Disclosure Act expressly sanctions it.

For these reasons, we reject the *Skura* rule and hold that the union has not committed any unfair labor practice within permissible interpretation of section 8(b)(1)(A).

According, the Board's petition for enforcement of its order will be denied and, on the petition to review, the order will be set aside.

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[1] There is no suggestion here that Holder could not have obtained intra-union review of his complaint against the local president within a four-month period. Indeed, when he appealed his expulsion, the General Executive Board of the International considered and decided the appeal very promptly.

United States Court of Appeals for the Third Circuit

No. 16055

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE

Before: HASTIE and SEITZ, *Circuit Judges*, and BODY, *District Judge*

THIS CAUSE came on to be heard upon the petition of Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and its Local 22 to review the order of the National Labor Relations Board issued against Petitioners, their officers, agents, and representatives on June 23, 1966, and upon cross-petition of the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on March 29, 1967, and has considered the briefs and the transcript filed in this cause. On June 22, 1967, the Court being full advised in the premises, handed down its decision denying the petition for enforcement and setting aside the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the Order of the National Labor Relations Board directed against Petitioners, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and its Local 22, their officers, agents, and representatives, be and it hereby is set aside.

By the Court,

WILLIAM H. HASTIE,
Circuit Judge.

Dated: August 7, 1967.

SUPREME COURT OF THE UNITED STATES

No. 796, October Term, 1967

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 22

ORDER ALLOWING CERTIORARI—Filed January 15, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 280516 565

No. 796

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO, AND ITS LOCAL 22

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A; *infra*, pp. 13–22) is reported at 379 F. 2d 702. The findings of fact, conclusions of law, and order of the National Labor Relations Board (App. C, *infra*, pp. 25–41; J.A. 16a–31a)[1] are reported at 159 NLRB No. 95.

JURISDICTION

The decision of the court of appeals was rendered on June 22, 1967 (App. A, *infra*, pp. 13, 22, and its de-

[1] "J.A." refers to the Joint Appendix in the court below.

cree was entered on August 7, 1967 (App. B, *infra*, pp. 23–24. On September 19, 1967, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The basic question is whether a union restrains or coerces a member in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of that Act, by expelling him for filing a charge against the union with the National Labor Relations Board without having exhausted internal union procedures for the resolution of intra-union disputes.

A subsidiary question is whether the charge filed by the employee adequately alleged that the union had violated his Section 7 rights. But see note 6, *infra*, pp. 10–11.

STATUTES INVOLVED

Sections 7 and 8(b)(1) of the National Labor Relations Act, as amended, 29 U.S.C. 157, 158(b)(1), provide in pertinent part as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the pur-

pose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 522, 29 U.S.C. 411(a)(4)) provides in pertinent part as follows:

Protection of the Right to Sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *.

STATEMENT

A. THE BOARD PROCEEDINGS

Edwin D. Holder, a member of Local 22 and its International Union, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, was employed by the United States Lines Company. Local 22 was the collective bargaining representative of the unit in which he worked (J.A. 19a; 3a–4a, 6a). The International Union's constitution, which was binding on Local 22, provided (J.A. 7a):

> Every member * * * considering himself * * * aggrieved by any action of this Union, the [General Executive Board], a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union.

Prior to February 28, 1964, Holder filed with Local 22 charges accusing its president of violating the International's constitution. Local 22 found that its president had not committed the alleged violations. (J.A. 19a–20a; 6a.) Without pursuing the intra-union appeals procedure,[2] Holder, on February 28, filed with the Board an unfair labor practice charge based on the same facts as his earlier charges filed with the Union. He alleged that Local 22 had violated Section 8(b)(2) and (1)(A) of the National Labor Relations

[2] The Union constitution provided, *inter alia*, for appeals to the General Membership, to the General Executive Board, and to the National Convention (J.A. 6a–7a).

Act "by causing U.S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U.S. Lines" (J.A. 19a; 4a, 6a).

At the end of April, Local 22 notified Holder that he had been accused of violating the Unions' by-laws and constitution by filing the unfair labor practice charge with the Board, and that it would hold a hearing thereon. Local 22 found Holder guilty of such violations and expelled him from the Local and the International. Upon Holder's appeal, the General Executive Board of the International affirmed the Local's action. (J.A. 20a–21a; 4a, 6a, 7a.) Holder then filed further unfair labor practice charges with the Board, alleging that the Unions violated Section 8(b)(1)(A) of the Act by expelling him for filing the earlier charge, and a complaint issued (J.A. 2a, 4a–5a).

The Board, adopting the trial examiner's decision (App. C, *infra*, p. 26), held that Local 22 and the International violated Section 8(b)(1)(A)—which makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of rights guaranteed by Section 7—by expelling Holder for filing charges with the Board without exhausting intra-union procedures (*id.*, pp. 33–37). The Board followed its earlier decision in *Local 138, Int'l Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679, where it had first held that such union discipline of a member was an unfair labor practice. The Board pointed out (*id.*, p. 34) that, in *Skura*, it had "declared that the

Act confers upon any person the right to file an unfair labor practice charge, that a fine is by nature coercive, and, hence, that the union's imposition of the fine against Skura for filing a charge with the Board was violative of his statutory rights." It ruled (*id.*, pp. 35–36) that "[u]nion discipline which coerces members"—whether a fine as in *Skura* or expulsion as in the present case—is "unlawful when administered to punish employees who file unfair labor practice charges with the Board seeking redress of their grievances against a union or its officials, and it is immaterial to this holding that the charges were filed with the Board in contravention of the union's constitutional or bylaw provisions compelling exhaustion of internal union procedures before resort to the Board's processes." The Board ordered the Unions to cease and desist from expelling members for filing charges with the Board, and to reinstate Holder to membership without any loss of status (*id.*, pp. 26–27, 38–41).

B. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Third Circuit set aside the Board's order. It stated that the issue was "the merits of the Board's so-called *Skura* rule"—which it noted the Court of Appeals for the District of Columbia Circuit had upheld in the *Roberts* case (see *infra*, pp. 8–9)—and it expressly "reject[ed]" the rule (App. A, *infra*, pp. 13–14, 20, 22). The court held that the proviso to Section 8(b)(1)(A) of the Act, which preserves "the right of a labor organization to prescribe its own rules with respect to the acquisi-

tion or retention of membership therein," "protects the union's action in this case" (*id.*, p. 19). Although recognizing that "the proviso does not enable a union to promulgate any rule it desires,"[2a] the court concluded that, since the "rule in question required only that the union be given a fair opportunity to correct its own wrong before the injured member should have recourse to the Board," it did not "offend public policy or impede the normal and proper administration of the Act" (*id.*, pp. 19–20). The court stated that the proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959—which prohibits a labor organization from limiting the right of any member to initiate any judicial or administrative proceeding but provides that a member may be required first to exhaust reasonable hearing procedures for not more than four months—"expressly sanctions" the use of union discipline designed to require pursuit of internal remedies (*id.*, p. 22). The court also stated that "for the right to file particular charges to be protected by section 7, the charges themselves must assert misconduct which, if proved, would constitute a deprivation of rights declared in that section," but that the "record contains no facts and no analysis by the Board upon the basis of which we can judge whether any type of violation of section 7 is involved here" (*id.*, pp. 17–18).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below that a union does not commit an unfair labor practice by disciplining

[2a] Cf. *Philadelphia Motion Picture Operators*, *infra*, n. 4, p. 9.

a member for filing a charge with the Board without first exhausting internal union procedures is, as that court recognized (App. A, *infra*, pp. 13–14, 20), in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Roberts* v. *National Labor Relations Board*, 350 F. 2d 427. There the court, quoting with approval from the Board's *Skura* decision (p. 429), upheld the Board's ruling that a union committed an unfair labor practice by fining a member for filing charges with the Board without having exhausted internal union procedures. (The Board's decision in *Roberts*, rendered the same day as *Skura*, rested on the latter opinion. *H. B. Roberts*, 148 NLRB 674, 676.) The court held (pp. 428–429) that the employee had a Section 7 right to file the charges; and that by disciplining him for doing so the union restrained and coerced him in the exercise of such right, in violation of Section 8(b)(1)(A). The court stated (p. 429) that the Board's order prohibiting the union from thus disciplining him was not "an inroad upon those internal affairs left by the Act and its policy to be administered solely by the Union," since "by filing a charge * * * [the member] stepped beyond the internal affairs of the Union and into the public domain." The court in *Roberts* also held that the proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 did not sanction the union discipline. It ruled that that section merely authorizes or requires the court or agency "to withhold the exercise of its authority—for four months if reasonable internal procedures are available and are not earlier exhausted," but does

not allow "the Union itself to impose a fine for failure of a member to exhaust such procedures" (p. 430).[3]

Although in *Roberts* the union discipline was a fine and in the present case it was expulsion, this distinction is irrelevant. The critical consideration is that the court below has taken a diametrically opposite view from that of the District of Columbia Circuit respecting the right of a union to discipline a member for filing charges with the Board without first exhausting internal union procedures. The question is important in the administration of the National Labor Relations Act.[4] Many union constitutions and by-laws require members to exhaust internal union procedures governing intra-union disputes before resorting to judicial

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[3] In *Ryan* v. *International Brotherhood of Electrical Workers*, 361 F. 2d 942 (C.A. 7), certiorari denied, 385 U.S. 935, the court of appeals agreed with *Roberts* that the proviso to Section 101(a)(4) merely granted the courts discretion to withhold action until the employee had exhausted internal union procedures for four months, but did not sanction union discipline for initiating judicial proceedings without such exhaustion of union procedures. See, also, *Detroy* v. *American Guild*, 286 F. 2d 75, 78 (C.A. 2), certiorari denied, 366 U.S. 929.

[4] In addition to its decisions in *Skura*, *Roberts* and the present case, the Board has prohibited union discipline of members for filing charges with the agency in the following cases: *Cannery Workers Union of the Pacific*, 159 NLRB No. 47, pending on petition to review, C.A. 9, No. 21680; *Brotherhood of Painters Local 585*, 159 NLRB No. 98; *Philadelphia Motion Picture Operators Local 344*, 159 NLRB No. 124, affirmed, C.A. 3, August 1, 1967, 65 LRRM 3020. See, also, *Millwrights Local 1510*, 152 NLRB 1374, affirmed, 379 F. 2d 679 (C.A. 5), and *Local Union 136 (Carpenters)*, 165 NLRB No. 139, in which the Board held that a union committed an unfair labor practice by threatening a member with discipline if he filed charges.

In *Tawas Tube Products, Inc.*, 151 NLRB 46, and *United Steelworkers of America*, 154 NLRB 692, the Board held that it is not an unfair labor practice for a union to discipline a

or administrative litigation,[5] and the authority of unions to discipline members who violate such provisions by filing charges with the Board significantly affects the relationships between a union and its members. In the circumstances, it is appropriate for this Court to resolve the conflict and settle the issue.

2. In view of the clear conflict and the importance of the issue, there is no occasion to discuss the merits at any length. In brief, the Board's position is that, since the agency may proceed against unfair labor practices only in response to charges filed with it, the right to file charges is necessary to the assertion of rights protected by Section 7 of the Act and therefore is protected by that section;[6] that by expelling or fining a member for filing charges a union "restrains"

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member for filing with the Board a petition under Section 9(c)(1)(A)(ii) of the Act to decertify the union as the bargaining representative. In *United Stelworkers* the Board distinguished *Skura* on the ground that there is a "fundamental distinction between union disciplinary action aimed at the filing of charges seeking redress for asserted infringement of statutory rights * * * and union disciplinary action aimed at defending [the union] from conduct which seeks to undermine its very existence" (154 NLRB at 696). See, also, *Cannery Workers Union of the Pacific, supra.* The Court of Appeals for the Ninth Circuit upheld the Board's *United Steelworkers* decision in *Price* v. *National Labor Relations Board*, 373 F. 2d 443, and a petition for certiorari to review that ruling is pending in No. 399. Because of the close relationship between the issue in the present case and in *Price*, we do not oppose the petition in the latter. See our memorandum in No. 399, being filed simultaneously herewith.

[5] *Disciplinary Powers and Procedures in Union Constitutions*, United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 1350, p. 28 (1963).

[6] The court below held (App. A, *infra*, pp. 16–19) that the original charge filed by Holder did not adequately allege that the Union had interfered with the exercise of rights guaranteed

or "coerces" him, within the meaning of Section 8(b)(1)(A), in the exercise of rights guaranteed by Section 7; that the proviso to Section 8(b)(1)(A), which recognizes "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership," does not authorize a union "to prevent or regulate access to the Board, and a rule requiring exhaustion of internal union remedies by means of which a union seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means" (*Skura*, 148 NLRB at 682);[7] and that the proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 authorizes the Board to defer for up to four months the

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by Section 7. Assuming without conceding that this was a relevant factor in determining whether the Union's expulsion of Holder for filing the charge constituted an unfair labor practice, the court of appeals erred in concluding that the charge was inadequate. Holder alleged "that Local 22 violated Section 8(b)(1)(A) and (2) of the Act by causing U.S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U.S. Lines" (J.A. 4a). The references to "protected activity" and to Section 8(b)(1)(A), which expressly makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7," demonstrate that an impairment of Section 7 rights was alleged. No greater specificity was required. "The charge is not proof. It merely sets in motion the machinery of an inquiry. * * * The charge does not even serve the purpose of a pleading." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18.

[7] In *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court sustained the Board's conclusion that Section 8(b)(1)(A) does not bar a union from fining members who cross its picket line during an authorized strike

processing of a charge while the employee exhausts the internal union procedures, but does not authorize the union to discipline him for filing a charge without having done so. See the opinion of the Board in *Skura* and that of the court of appeals in *Roberts*, where these principles are more fully developed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.

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General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

NOVEMBER 1967.

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and from attempting to collect those fines through court suits. Unlike the Union's attempt to block access to the Board's unfair labor practice procedures here involved, the union's endeavor in *Allis-Chalmers* to make the strike effective was not beyond the union's "lawful competency to enforce by coercive means" (*Skura*, *supra*). As the Court pointed out (*id.* at 181), the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *.'" No comparable policy consideration could be invoked to justify the union's conduct in the present case.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 16055

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of an Order of the National Labor Relations Board

Argued March 29, 1967

Before: HASTIE and SEITZ, *Circuit Judges*, and BODY, *District Judge*

OPINION OF THE COURT

(Filed June 22, 1967)

By HASTIE, *Circuit Judge.*

On the petition of an international union and one of its locals for the review of an unfair labor practice decision and order, 159 NLRB No. 95, and a cross-petition of the National Labor Relations Board for enforcement of the order, we here consider the merits of the Board's so-called *Skura* rule, as recently adopted in *Local 138, International Union of Operating Engineers and Charles S. Skura*, 1964, 148 N.L.R.B. 679, and sanctioned by the Court of Appeals

for the District of Columbia in *Roberts* v. *N.L.R.B.*, D.C. Cir., 1965, 350 F. 2d 427.

The alleged unfair labor practice in this case is the union's conduct in discharging Edwin Holder from union membership because he had filed with the Board an unfair labor practice charge against the local and its president without first exhausting prescribed and available remedies within the labor organization.

Holder had filed intra-union charges with his local, alleging that the local president had wrongfully caused Holder's employer to discriminate against him because of "certain legally protected activity". Except for the quoted phrase, the present record does not disclose details or even the substance of Holder's complaint. The local considered and dismissed these charges. The International Constitution of the union provided for an appeal from the decision of a local to the General Executive Board of the International. It also required that any member "aggrieved by any action of * * * a local * * * shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union". Disregarding this requirement and without taking any intra-union appeal from the local's decision, Holder filed with the Board an unfair labor practice charge against the local, alleging the same conduct of which he had unsuccessfully complained to the local. Here again, the present record fails to specify the details of that conduct. The General Counsel refused to issue a complaint and the unfair labor practice charge was dismissed.

Shortly thereafter, Holder was charged before the trial board of his local with violation of the above cited provision of the International Constitution. He

was found guilty and expelled from membership. He then appealed to the General Executive Board of the International which confirmed his expulsion.

Holder next initiated the present unfair labor practice proceeding, charging that the labor organization had violated section 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(A), by coercing him in the exercise of rights guaranteed by section 7 of the Act. Applying the *Skura* rule, the Board found a violation as charged and issued the unfair labor practice order which is now before us.

Section 8(b)(1)(A) reads in pertinent part as follows:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

Thus, the only rights which this subsection protects are those contained in section 7, which reads in its entirety as follows:

> Employees shall have the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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Accordingly, our first inquiry is whether section 7 protects an employee's asserted right to complain to the Board of his union's alleged unfair interference with his "legally protected activity" without first exhausting his remedy within the union as required by the union's constitution.

It will be observed that section 7 says nothing about any right to file charges with the Board. That section is concerned exclusively with an employee's freedom to unionize, to bargain collectively, and to engage in other concerted activities, as well as the concomitant freedom to refrain from participating in such organized or concerted activity. These freedoms are, by necessary implication, attended by a remedial right of the employee to charge coercive abridgement of them in an unfair labor practice proceeding before the Board. Thus, a section 8(b)(1)(A) unfair labor practice can be established here by showing that rights incidental to organization or bargaining were the basis of Holder's complaint which led to punitive union action, and in no other way.

It is argued here, as it was in the *Roberts* and *Skura* cases that section 7 protects the employee's freedom to complain to the Board of union misconduct regardless of the foundation for the charge. But as we have just pointed out, if any respect is to be accorded the language of section 7, its protection of the right to file charges must be limited to complaints that the union has in some way interfered with the sort of activity that is described in that section. It may be that Holder's complaint was of such a breach of the union's duty to represent the employee fairly as the Court of Appeals for the Fifth Circuit recently found to be inherent in the collective bargaining process protected by section 7. *Local Union No. 12, United Rubber, C.L.&P. Workers* v. *NLRB,* 5th Cir., 1966, 368 F. 2d

12. But this record contains no facts and no analysis by the Board upon the basis of which we can judge whether any type of violation of section 7 is involved here.

The *Skura* decision itself, which is indistinguishable from and followed in this case, is similarly lacking in any showing of how that controversy involved the subject matter of section 7. Only a few months earlier, in the so-called *Wisconsin Motor case, Local 283, UAW,* 1964, 145 NLRB 1097, the Board, after reviewing pertinent legislative history, had ruled that it had "not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee". 145 NLRB at 1104. In the *Skura* case, the Board recognized its Wisconsin Motor "opinion that the Act did not vest it with authority to police the internal discipline of a union short of job discrimination". 148 NLRB at 682. Hard put to distinguish the two cases factually, the Board announced and relied upon its view that "overriding public interest" required that a union not be permitted to discipline an employee in an effort to "limit access to the Board's processes". To that end, it apparently read into section 7, without any stated justification, a general right of access to the Board, unlimited by any requirement that the particular controversy involve organizational rights or rights inherent in collective bargaining.

In the *Roberts* case, the Court of Appeals said "we assume, and petitioners agree, as stated in their brief, that 'the right of an employee to file charges is protected under section 7' ". 350 F. 2d at 428. But the court seems not to have considered what we have attempted to demonstrate, that in order for the right to

file particular charges to be protected by section 7, the charges themselves must assert misconduct which, if proved, would constitute a deprivation of rights declared in that section.

The *Roberts* opinion also points out that section 8(a)(4) expressly makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges" under the Act. From this the court seems to imply that a union should be treated in the same manner and that Congress must have so intended. But while the Taft-Hartley Act undoubtedly undertook to impose many responsibilities upon unions equivalent to the responsibilities of employers under the original Wagner Act, we find no basis for concluding that whatever had been required of the one is now implicity required of the other. Indeed, included in the Taft-Hartley bill as it passed the House was a provision, section 8(c)(5), which stipulated that punitive action by a union against a member for filing charges against the union or otherwise taking issue with it constituted an unfair labor practice. 1 Leg. Hist. L.M.R.A. 53–54. But the conference committee deleted this section and the bill was enacted without it. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 46, U.S. Code Cong. Service 1947, 1135. Thus, it was not by inadvertence that Congress failed to include in the Taft-Hartley Act a general section explicitly protecting union members who filed charges against their unions from union reprisals.

In this area of Taft-Hartley Act restrictions on union conduct, imposed as "the result of conflict and compromise between strong contending forces", the Supreme Court has counseled "wariness in finding by construction a broad policy against" a type of conduct "when * * * it is clear that those interested in

just such a condemnation were unable to secure its embodiment in enacted law". *Local 1976, United Brotherhood of Carpenters* v. *NLRB,* 1958, 357 U.S. 93, 99–100. Mindful of this admonition and its pertinence to the present issue, we think neither the board nor a court can properly employ its views of public policy as justification for engrafting upon section 7 a general right of unlimited access to the Board, the declaration of which the Congress considered but chose to withhold.

In these circumstances, if there were no other error in the Board's decision, we would remand the cause for reconsideration and further showing whether and how section 7 rights are involved in Holder's original complaint. However, there are other considerations which require that the Board's decision be set aside.

We have not heretofore discussed the proviso of section 8(b)(1)(A), "that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." We think that proviso protects the union's action in this case.

We agree with the Board that the proviso does not enable a union to promulgate any rule it desires and hinge membership upon adherence. For example, a union rule which subjected a member to dismissal or other disciplinary action for filing charges with the Board against the union alleging conduct which, if proved, would constitute an unfair labor practice within some provision of the Act, would frustrate the operation of the Act and thus, by logical implication, be outside of the protection of the proviso. Here, however, the union rule in question required only that the union be given a fair opportunity to correct its own wrong before the injured member should have recourse to the Board. We do not see how such a rule offends

public policy or impedes the normal and proper administration of the Act. Indeed, to the extent that such a rule relieves the Board of the unnecessary burden of grievances that can be settled within a union, it serves the purposes of the Act well. On the other hand, the member's right to charge his union before the Board is not detrimentally affected by requiring that the exercise of that right be postponed until after a practical and reasonable resort to internal remedies as provided by the union. *Cf. Harris* v. *International Longshoremen's Assn., Local 1291,* 3d Cir., 1963, 321 F. 2d 801. Of course, a court or an administrative agency will determine for itself whether the alleged intra-union remedy is in fact available and whether resort to it would impose unreasonable delay or hardship upon the complainant.

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411 (a)(4), both confirms our view of the impact of public policy in a situation such as this and makes it mandatory that the *Skura* rule be rejected and the Board's action in this case set aside. Section 101(a)(4) appears in that part of the 1959 Act which is entitled, "Bill of Rights of Members of Labor Organizations". It provides that "no labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * *. *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations * * *."

It will be observed that the subsection applies to proceedings "before any administrative agency", thus covering the present proceeding before the National

Labor Relations Board. Indeed, the introductory section of the 1959 Act recites as one of its purposes the correction of union and management practices "which distort and defeat the policies of the" Taft-Hartley Act. But in applying the statute's general prohibition of union action restricting the right of a member to institute a proceeding before an administrative agency, the Board is equally obligated to respect the attending proviso, "that any such member may be required to exhaust reasonable hearing procedures * * * within such organization * * *."

To avoid the impact of this proviso, the Board argues that the proviso does not say who may require the union member to exhaust internal hearing procedures and then reaches the surprising conclusion that it is the Board, rather than any labor organization, that is authorized by Congress to require that a union member resort to reasonable intra-union procedures. We think this construction does violence to the structure and the sense of section 101. That section is entitled, "Bill of rights; constitution and by-laws of labor organizations". It consists of a number of provisions prescribing what unions may and may not do and require in the conduct of their affairs and in the treatment of their members. The general prohibition in the subsection here in question is expressly directed against labor organizations. Logically, and in normal reading, the attendant and qualifying proviso is an exception stating what such an organization may do despite the preceding general restriction upon its action. Moreover, there is no need for a proviso to authorize a court or an administrative body to postpone its action until a litigant shall exhaust intra-union remedies, since judicial and quasi-judicial bodies frequently exercise such discretionary power to postpone their own action pending the exhaustion of other

remedies as a matter of inherent right without benefit of legislation.

For these reasons we hold, as has been said in a concurring opinion in one of our earlier decisions, that this subsection means "that a union may not restrict a member's resort to the courts except that it may require that the member first devote not more than four months to reasonable grievance procedures within the organization".[1] See *Sheridan* v. *United Brotherhood of Carpenters, Local 626,* 3d Cir., 1962, 306 F. 2d 152, concurring opinion of Hastie, J., at 160. But *cf. Detroy* v. *American Guild of Variety Artists,* 2d Cir., 1961, 286 F. 2d 75, *cert. denied* 366 U.S. 929. It follows that in administering the National Labor Relations Act, the Board may not make the union's conduct in this case an unfair labor practice because section 101(a)(4) of the Labor-Management Reporting and Disclosure Act expressly sanctions it.

For these reasons, we reject the *Skura* rule and hold that the union has not committed any unfair labor practice within permissible interpretation of section 8(b)(1)(A).

Accordingly, the Board's petition for enforcement of its order will be denied and, on the petition to review, the order will be set aside.

[1] There is no suggestion here that Holder could not have obtained intra-union review of his complaint against the local president within a four-month period. Indeed, when he appealed his expulsion, the General Executive Board of the International considered and decided the appeal very promptly.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 16055

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO, AND ITS LOCAL 22, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

(File in formal file R)

DECREE

Before: HASTIE and SEITZ, *Circuit Judges,* and BODY, *District Judge*

THIS CAUSE came on to be heard upon the petition of Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and its Local 22 to review the order of the National Labor Relations Board issued against Petitioners, their officers, agents, and representatives on June 23, 1966, and upon cross-petition of the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on March 29, 1967, and has considered the briefs and the transcript filed in this cause. On June 22, 1967, the Court being full advised in the premises, handed down its decision denying the petition for enforcement and setting aside the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the Order of the National

Labor Relations Board directed against Petitioners, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and its Local 22, their officers, agents, and representatives, be and it hereby is set aside.

By the Court,

WILLIAM H. HASTIE,
Circuit Judge.

Dated: August 7, 1967.

APPENDIX C

United States of America Before the National Labor Relations Board

Case No. 2–CB–4148

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO, AND LOCAL 22, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO (UNITED STATES LINES COMPANY) AND EDWIN D. HOLDER

DECISION AND ORDER

On November 22, 1965, Trial Examiner Thomas N. Kessel issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondents and the General Counsel filed execptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudi-

cial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the modifications noted herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommendations of the Trial Examiner, as modified below, and hereby orders that the Respondents, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, their officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommendations, as herein modified:

1. Delete from paragraph 1(a) of the Trial Examiner's Recommendations, and from the first paragraph of the Appendix attached to the Trial Examiner's Decision the last line beginning with the words, "without first exhausting * * *."

2. Substitute for paragraph 2(a) the following:

"(a) Upon request, reinstate Edwin D. Holder to membership in their organizations without requiring payment of back dues for the period of his expulsion, except for that portion of his dues which is shown at the compliance

[1] In this connection and for a detailed discussion of the issues presented by this case, see the recently issued case of *Van Camp Sea Food Co., Inc.*, 159 NLRB No. 47.

stage to be regularly allocable to the cost of insurance premiums, pension contributions and other welfare benefits accruing to Respondents' members; to the extent that benefits such as life insurance, health, and medical insurance and benefits and the like cannot be made retroactively for Holder, Respondents shall reimburse Holder for any expenses or losses, with interest thereon at 6 percent per annum, suffered as a result of the absence of such benefits, less the proportion of Holder's dues which would have been allocable to the payment of premiums for or other purchase of such benefits."

3. Substitute for the second indented paragraph of the attached "Appendix" the following:

"WE WILL reinstate EDWIN D. HOLDER, upon application, to membership in our organizations without loss of any status as a member because of our expulsion of Holder from membership, and we will reimburse him, with interest thereon, for any losses or expenses suffered because of the absence of certain benefits during the period of his expulsion in accordance with a Decision and Order of the National Labor Relations Board."

Dated, Washington, D.C., Jun. 23, 1966.

FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
HOWARD JENKINS, Jr.,
Member,
[SEAL] *National Labor Relations Board.*

and its own Rules and Regulations, requested the Chief Trial Examiner to designate another Trial Examiner in the proceeding in place of Trial Examiner Hilton. On October 12, 1965, I received such designation.

On the basis of the record before me, including the rulings by Trial Examiner Hilton, I make the following:

FINDINGS OF FACT

I. Commerce facts

The complaint alleges and the answer admits that United States Lines Company, herein called U.S. Lines, is a New Jersey corporation maintaining a principal office and place of business in New York City where it has been engaged in operating ocean going vessels in domestic and foreign commerce. During the year preceding issuance of the complaint U.S. Lines performed services valued in excess of $100,000 for various enterprises located in States other than New York. I find from the foregoing facts that U.S. Lines is engaged in interstate commerce within the meaning of the Act and that the Act's purposes will be effectuated by the Board's assertion of jurisdiction in this case over its operations.

II. The labor organizations involved

IUMSWA and Local 22 are labor organizations within the meaning of the Act. IUMSWA is the parent International of Local 22.

III. The unfair labor practices

The Respondents' alleged violation of Section 8(b)(1)(A) is based on their expulsion from membership in their organizations of charging party Holder be-

cause he had filed an unfair labor practice charge against Local 22 with the Board's Regional Office. The answer admits the essential facts pleaded by the complaint but denies that these facts constitue unlawful conduct. These are the facts, in addition to those above stated, established by the pleadings:

(a) Local 22 has at all times material been recognized by U.S. Lines as the collective bargaining representative of a unit of its painters.

(b) At all times material Holder was employed by U.S. Lines within the foregoing unit.

(c) At all times material and until June 9, 1964, Holder was a member of both Local 22 and IUMSWA.

(d) On February 28, 1964, Holder filed an unfair labor practice charge against Local 22 with the Board's Second Regional Office in Case No. 2–CB–3959 alleging that Local 22 had violated Section 8(b)(1)(A) and (2) of the Act by causing U.S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U.S. Lines.

The answer expressly admits the facts related in the foregoing paragraph but defensively pleads certain other facts which the General Counsel has moved to strike as irrelevant. These are the assertions in the answer:

> * * * the unfair labor practice charge in Case No. 2–CB–3959 was filed by Holder only after he had previously filed with Local 22 charges accusing the president of Local 22 of violating certain provisions of the IUMSWA constitution and said charges had resulted in a finding that the president was innocent of said charges. The unfair labor practice charge filed by Holder in Case No. 2–CB–3959 was based on the same facts as those on which his charges against Local 22's president had been based.

(e) On or about April 29, 1964, Holder was notified by letter from Local 22's president that on May 13, 1964, a hearing would be held before Local 22's Trial Board to determine whether there was merit to charges brought against Holder that he had violated Local 22's by-laws and the IUMSWA constitution by filing the unfair labor practice charge in Case No. 2–CB–3959.

The answer expressly admits this allegation but defensively pleads certain other facts which the General Counsel has also moved to strike as irrelevant. The answer quotes the provisions of the IUMSWA constitution, binding on Local 22, pertaining to procedures for expulsion of members, and the constitutional provision compelling members aggrieved by any action of IUMSWA, its constituent locals or officers, to exhaust all remedies and appeals provided by the constitution before resorting to any outside court or tribunal. The answer asserts Holder violated the foregoing constitutional provision by the filing of a charge in Case No. 2–CB–3959 and attributes this action to his dissatisfaction with the finding by Local 22 that its president was innocent of the charges Holder had preferred against him.

(f) On or about June 8, 1964, at a membership meeting, Local 22 announced through its Executive Board that it had found Holder guilty of the foregoing charges of violation of the Respondent's by-laws and constitution and thereupon Local 22 expelled him from membership in the Respondents.

(g) On or about June 19, 1964, Holder appealed the foregoing decision by Local 22 to the General Executive Board of IUMSWA and on or about October 7, 1964, that board denied Holder's appeal and upheld and confirmed his expulsion from membership in the Respondents.

The General Counsel relies upon the Board's decisions in *Skura,* 148 NLRB No. 74, *Wellman-Lord,* 148 NLRB No. 81 and *Tawas Tube,* 151 NLRB No. 9, to support the contention that the Respondents violated Section 8(b)(1)(A) of the Act by Holder's expulsion from membership. The Respondents contend that the facts of the instant case are distinguishable from those in *Skura and Wellman-Lord* and that the Board's holdings in those cases are not here applicable. The Respondents further argue that the Board incorrectly decided *Skura* and that its holding should not therefore here be applied. Concerning *Tawas Tube,* the Respondents contend that the Board's holding therein supports the defense rather than the General Counsel's case.

In *Skura* a member (Skura) of the union involved in the case had filed an unfair labor practice charge with the Board's Regional Office against the union claiming its discriminatory refusal to refer him to available employment. The Regional Director thereafter notified Skura of his decision not to issue a complaint based on the charge, whereupon Skura withdrew the charge. Subsequently charges were preferred against *Skura* by the union's official claiming that he had violated the union's by-laws when he filed the unfair labor practice charge. These by-laws, like the by-laws in the instant case, compelled aggrieved members to exhaust all means provided by the constitution of the union's parent International before resorting to "any civil or other action." Although notified, *Skura* did not appear before the union's grievance committee for the hearing on the charge against him, was tried *in absentia,* was found guilty of violating the foregoing constitutional provision and was fined $200. His subsequent tender of union dues was refused because the

union's by-laws forbade acceptance of dues from members who had fines outstanding.

The Board held that the Union had violated Section 8(b)(1)(A) of the Act by fining *Skura* in the foregoing circumstances. It declared that the Act confers upon any person the right to file an unfair labor practice charge, that a fine is by nature coercive, and, hence, that the union's imposition of the fine against *Skura* for filing a charge with the Board was violative of his statutory rights. The Board concluded that the union had violated the Act by its conduct notwithstanding the union's rule prohibiting aggrieved members from resorting to external procedures before exhausting internal union means for remedy of grievances.

Wellman-Lord was a companion case and was issued by the Board on the same day with its decision in *Skura*. The *Wellman-Lord* facts are essentially like those of *Skura* and the holdings in both cases are identical.

The *Tawas-Tube* decision was issued by the Board in the context of a representation proceeding. An issue in the case involved the union's expulsion from membership of two members one of whom had filed a petition to decertify the union as collective bargaining representative of the employees of the employer in the case. The other employee had with the first supported the decertification cause. While the election in the decertification proceeding was pending, these employees were notified by the union's president that they were to be tried by the union for violation of a provision of the parent International's constitution creating the offense of

> advocating or attempting to bring about the withdrawal from the International Union of any Local Union or any member or group of members.

The two employees were thereafter tried by a committee of their union's members and were expelled for their activities. The issue resulting from this action was whether the election in the decertification proceeding should be set aside on the ground that the expulsions restrained or coerced unit employees. The Regional Director concluded that under *Skura* the Union's conduct was an unfair labor practice and that the election should be set aside. The Board disagreed.

The Board construed the proviso to Section 8(b)(1)(A) [1] of the Act to exclude the foregoing union conduct from the proscriptions of that section. The expulsions were regarded by the Board as "appropriate union disciplinary action under the circumstances." Noting that *Skura* was not a controlling precedent, the Board emphasized that it had, in deciding the *Skura* case, "limited the scope of the union disciplinary action generally allowable under the terms of section 8(b)(1)(A)'s proviso because of the importance of safeguarding prompt and unimpeded access to the Board's processes by employees complaining of union infringement of their statuatory rights. We held that in light of this overriding policy it was beyond the competence of the Union to enforce its rule by coercive means and thus deter employees from restoring to Board processes in such circumstances."

It is clear that the *Tawas Tube* decision does not disturb the Board's *Skura* holding. Union discipline which coerces members is still unlawful when administered to punish employees who file unfair labor practice charges with the Board seeking redress of their grievances against a union or its officials, and it is

[1] The proviso states that the language of Section 8(b)(1)(A) "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

immaterial to this holding that the charges were filed with the Board in contravention of the union's constitutional or bylaw provisions compelling exhaustion of internal union procedures before resort to the Board's processes. Application of these governing Board principles to the facts of the instant case compels the conclusion that by the expulsion of Holder for membership because he had filed unfair labor practice charges against Local 22 with the Board's Regional Office in Case No. 2–CB–3959 the Respondents violated Section 8(b)(1)(A) of the Act.

In reaching the foregoing conclusion I accord no merit to the contention in the Respondents' letter answering the General Counsel's Supplemental Memorandum that the Board's *Tawas Tube* holding should be construed to mean that an expulsion from membership, unlike the imposition of a fine, has no coercive effect upon employees in the exercise of statutory rights. There is no support in *Tawas Tube,* or in logic, for this generalization. Although the Board in *Tawas Tube* regarded the expulsion of employees who were seeking the union's decertification as an ineffective deterrent against resorting to the Board's processes, it said this while underscoring the fact that "loss of membership was of no significance" to these employees. This is not true in Holder's case. There is no indication that continuation of his membership in the Respondents meant nothing to him. To the contrary, this very proceeding, initiated by Holder's filing of unfair labor practice charges against the Respondents for his expulsion, shows positively that his membership was significant to him. Further, I have no doubt that, if, as the Board said in *Skura,* "a fine is by nature coercive", an expulsion from membership even more effectively coerces employees. The ultimate penalty associated with the imposition of a fine is loss of membership in the union which may be avoided by

payment of the fine. Expulsion from membership leaves no room for grace. The ultimate penalty, with loss of benefits inherent in union membership including a voice in the democratic decisions of the organization materially affecting the welfare of members, is immediate and final.

Having concluded from the facts established by the pleadings that the Respondents have violated Section 8(b)(1)(A) of the Act, the General Counsel's motion for judgment on the pleadings is granted. There is, accordingly, no need to pass on the General Counsel's motion to strike portions of the Respondents' answer.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in section III, above, occurring in connection with the operations of U.S. Lines, described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

Having found that the Respondents have engaged in unfair labor practices violative of Section 8(b)(1)(A) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. United States Lines Company is an employer within the meaning of Section 2(2) of the Act and is

engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By expelling Edwin D. Holder from membership in their organizations because Holder had filed unfair labor practice charges with the Board without first exhausting his internal union remedies, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this proceeding I recommend that Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and Local 22, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, their officers, agents, and representatives shall:

1. Cease and desist from:

(a) Expelling employees from membership in their organizations because they have filed unfair labor practice charges with the Board against them or their officials without first exhausting their internal union remedies.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed employees in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Reinstate to membership in their organizations Edwin D. Holder without any loss of status as a member resulting from his expulsion.

(b) Post at their business offices and at all other places where notices to members are customarily posted, in conspicuous places, copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by official representative of the Respondents, be posted by the Respondents immediately upon receipt thereof and maintained by them for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Second Region in writing within 20 days from the receipt of this Decision and Recommendations what steps they have taken to comply therewith.[3]

Dated at Washington, D.C.

THOMAS N. KESSEL,
Trial Examiner.

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[2] In the event that these Recommendations shall be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[3] In the event that these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Second Region in writing within 10 days from the date of receipt of this Order what steps the Respondents have taken to comply herewith."

NOTICE

TO ALL MEMBERS OF INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO AND LOCAL 22, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO (UNITED STATES LINES COMPANY)

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT

We hereby notify you that:

WE WILL NOT expel employees from membership in our organizations because they have filed unfair labor practice charges with the National Labor Relations Board against us or our officials without first exhausting their internal union remedies.

WE WILL reinstate Edwin D. Holder to membership in our organizations without loss of any status as a member because of our expulsion of Holder from membership.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO

(*Labor Organization*)

Dated_____ By_____

(*Representative*) (*Title*)

LOCAL 22, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO (UNITED STATES LINES COMPANY)

(*Labor Organization*)

Dated_____ By_____

(*Representative*) (*Title*)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 5th Floor Squibb Building, 745 Fifth Avenue, New York, New York 10022 (Tel. No. 751–5500).

U.S. GOVERNMENT PRINTING OFFICE: 1967

No. 796

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO, AND ITS LOCAL 22

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (R. 33–40) is reported at 379 F. 2d 702. The decision and order of the National Labor Relations Board (R. 14–25) are reported at 159 NLRB 1065.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1967 (R. 41). On September 19, 1967, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to, and including, November 6, 1967, and the petition for a writ of certiorari was filed on that date, and was granted on

January 15, 1968 (R. 42). The jurisdiction of the Court rests on 28 U.S.C. 1254(1), and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 522, 29 U.S.C. 411, *et seq.*) are set forth in the Appendix, *infra*, pp. 39–42.

QUESTION PRESENTED

Whether a union commits an unfair labor practice, in violation of Section 8(b)(1)(A) of the National Labor Relations Act, by disciplining a member for filing a charge against the union with the National Labor Relations Board before he had exhausted all internal union procedures for the resolution of his dispute.[1]

STATEMENT

Edwin D. Holder, a member of Local 22 and its International Union, the Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, was employed by the United States Lines Company. Local 22 was the collective bargaining representative of the unit in which he worked. (R. 16; 3, 5.) The International Union's constitution, which was binding on Local 22, provided (R. 6):

[1] A subsidiary question is whether the charge filed by the member in this case adequately alleged that the union had violated his Section 7 rights (*infra*, pp. 17–18).

> Every member * * * considering himself * * * aggrieved by any action of this Union, the [General Executive Board], a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union.

Prior to February 28, 1964, Holder submitted charges to Local 22 accusing its president of violating the International's constitution, but the Local decided that its president had not committed the alleged violations. (R. 16–17, 5.) Without pursuing the intra-union appeals procedure,[2] Holder, on February 28, filed with the Board an unfair labor practice charge based on the same facts as his earlier charges filed with the Union. He alleged that the Local had violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act "by causing U.S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U.S. Lines" (R. 16; 3, 5, 28).[3]

[2] The International's constitution provided, *inter alia*, for appeals to the General Membership, to the General Executive Board, and to the next National Convention (R. 6).

[3] Holder filed a companion charge with the Board against the Company, alleging that it had violated Section 8(a) (3) and (1) of the Act by discriminating against him in the assignment and distribution of work because of his union activities (R. 27). Holder's charges were predicated, *inter alia*, on his contention that Local 22 and the Company had caused him to be demoted, with a consequent loss of seniority and work, because of his intra-union opposition to the president of Local 22, and that Local 22 had thereafter unlawfully refused to process his grievance relating to the demotion. Fol-

Not long thereafter, Local 22 notified Holder that intra-union charges had been lodged against him alleging that he had violated the Unions' by-laws and constitution by filing the unfair labor practice charge with the Board before he had exhausted his internal remedies. After a hearing before a trial board of the Local, Holder was found guilty of the violations alleged and expelled from the Local and the International. Upon Holder's appeal, the General Executive Board of the International affirmed the Local's action. (R. 17; 3–4, 5.) Holder then filed the instant unfair labor practice charge with the Board alleging that the Unions had violated Section 8(b)(1)(A) of the Act by expelling him for filing the earlier charge, and a complaint issued (R. 26, 2–5).

The Board found that Local 22 and the International violated Section 8(b)(1)(A) of the Act by expelling Holder for filing a charge with the Board without first having exhausted his intra-union procedures (R. 24–25, 14–23a). The Board noted that in *Local 138, Int'l Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679, it had held "that the Act confers upon any person the right to file an unfair labor practice charge, that a fine is by nature coercive, and, hence, the union's imposition of [a] fine against [a member] for filing a charge with the Board was violative of his statutory rights" (R. 18). The Board concluded that this principle was applicable here, since, if " 'a fine is by nature coercive,' an

lowing investigation, the Board's Regional Office declined to issue a complaint on the charges, on the ground that they were untimely and lacking in evidentiary support (R. 29–32).

expulsion from membership even more effectively coerces employees" (R. 21). The Board ordered the Unions to cease and desist from expelling members for filing charges with the Board, and to reinstate Holder to membership without any loss of status (R. 22–23a, 24–25).

The court of appeals set aside the Board's order (R. 33–40). The court read Section 8(b)(1)(A) as protecting a union member's right to file unfair labor practice charges against his union only if the charges themselves assert misconduct which, if proved, would constitute a deprivation of rights protected by Section 7 (R. 36–37). The court suggested that Holder's charge was inadequate by that standard, but determined not to remand the case to the Board for consideration of whether Section 7 rights were sufficiently involved because of what it found to be other errors requiring that the Board's order be set aside (R. 38).

The court held that the proviso to Section 8(b)(1)(A) of the Act, which preserves "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," "protects the union's action in this case" (R. 38). Although recognizing that "the proviso does not enable a union to promulgate any rule it desires," the court concluded that, since the "rule in question required only that the union be given a fair opportunity to correct its own wrong before the injured member should have recourse to the Board," it did not "offend public policy or impede the normal and proper administration of the Act" (*ibid.*). The court

further found that the proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959—which prohibits a labor organization from limiting the right of any member to initiate any judicial or administrative proceeding but provides that a member may be required first to exhaust reasonable hearing procedures not exceeding four months—"expressly sanctions" the use of union discipline designed to require pursuit of internal remedies (R. 40).

SUMMARY OF ARGUMENT

I

Only when a charge has been filed with the National Labor Relations Board may the Board exercise its unfair labor practice jurisdiction. For this reason, this Court has recently noted that "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238. In addition to Section 8(a)(4) of the National Labor Relations Act which explicitly makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges under the Act, the general prohibition in Section 8(a)(1) against coercion of "employees in the exercise of the rights guaranteed in Section 7" also prohibits employer retaliation because an employee has resorted to Board processes. For a union to discipline an employee-member for filing charges with the Board without first exhausting intra-union procedures tends to

restrain or coerce him in the exercise and protection of his Section 7 rights by filing charges with the Board as promptly as he considers necessary. Hence, the Board has properly concluded that such union discipline violates Section 8(b)(1)(A) of the Act, which makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7."

II

This Court has held that Section 8(b)(1)(A) does not bar a union from disciplining strikebreakers, because in adding that paragraph Congress did not intend to regulate the internal affairs of unions. A proviso to Section 8(b)(1)(A) specifically states that the paragraph "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." The instant case, however, is materially different from that to which the proviso is addressed. A union rule requiring exhaustion of union procedures before invoking the Board's processes extends beyond the area of legitimate internal union affairs and impinges upon the channels created by Congress for the administration of a public law and policy.

Thus, although union constitutions frequently contain provisions which require a member, under pain of discipline, to exhaust internal union procedures before resorting to a court or other outside tribunal, it has generally been recognized that such restrictions are against public policy. (Such a rule is to be distinguished from the principle that a court may choose not

to entertain a member's action against a labor organization until he has exhausted all adequate remedies within the organization; the latter is a rule of judicial administration.) Moreover, to permit a union to discipline a member for filing charges with the Board without exhausting intra-union procedures would impair the effective administration of the Act. For it would require the member who believes that a union official has committed an unfair labor practice either to pursue a private remedy which affords little promise of providing a full and complete remedy for the wrong committed, or to risk a union penalty should Board processes be invoked without such exhaustion and the Board ultimately find that the member's charge is without merit.

III

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 does not require a different conclusion. The opening portion of that section—"No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency"—shows that the main thrust of the section is to prohibit those limitations by unions which the courts had previously declared to be contrary to public policy, such as a limitation on the right to sue. The proviso to Section 101(a)(4)—stating that "any * * * member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or other administrative proceed-

ings"—does not warrant upholding union discipline in cases such as this. Construing this proviso in accordance with the substantive policy of the section, and in light of its legislative history, the proviso does not authorize the union, as the court below held, to discipline a member who has not exhausted intra-union procedures for at least four months. The proviso is only a direction to the courts or other agencies that they may not remit a member to such procedures for a longer period and, in any event, may require resort to internal remedies only if, in their judgment, there is a reasonable likelihood that those procedures would provide an adequate remedy for the wrong complained of.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT A UNION VIOLATES SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT BY DISCIPLINING A MEMBER BECAUSE HE FILED CHARGES WITH THE BOARD WITHOUT FIRST HAVING EXHAUSTED HIS INTERNAL UNION REMEDIES

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7." The question presented is whether in light of the history of that provision and its proviso that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *", a union violates Section 8(b)(1)(A) where it expels a member (who is also an employee) for filing charges with the Board without first exhausting internal union procedures. The Board has reasonably

determined that the effective administration of the Act demands that employees have an unfettered right to bring their grievances to the attention of the Board as promptly as they consider necessary; that Section 8(b)(A)(1) of the Act prohibits employer interference with the right to file charges with the Board; and that similar considerations warrant interpreting Section 8(b)(1)(A) as barring corresponding union interference with that right by the threat of discipline for exercising it without first having exhausted internal union procedures Neither the recent decision in *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, nor the proviso to Section 8(b)(1)(A), nor Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act (*infra*, p. 42) warrants a contrary conclusion.

A. THE EFFECTIVE ADMINISTRATION OF THE ACT IS DEPENDENT UPON FULL FREEDOM TO FILE CHARGES WITH THE BOARD; TO INTERPRET SECTION 8(b)(1)(A) AS PERMITTING UNION DISCIPLINE FOR PROMPT FILING OF A CHARGE WITH THE BOARD UNDULY ERODES THIS FREEDOM AND CONFLICTS WITH OTHER POLICIES AND PROVISIONS OF THE ACT

1. Section 7 of the Act gives employees the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also the right "to refrain from any or all such activities." Section 8 makes certain conduct by employers and labor organizations which abridges these rights unfair labor practices, and Section 10(a) empowers the Board "to

prevent any person from engaging in any [such] unfair labor practice." The Board, however, cannot initiate its own proceedings;[5] Section 10(b) provides that it can act only "[w]henever *it is charged* that any person has engaged in or is engaging in any * * * unfair labor practice." (Emphasis added). As this Court recently noted, "[i]mplementation of the Act is dependent upon the initiative of individual persons who must * * * invoke its sanctions through filing an unfair labor practice charge." *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238.[6]

Because only the filing of a charge can trigger the Board's processes, "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board" (*ibid.*). Section 8(a)(4) explicitly makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges under the Act.[7]

[5] See *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 236, citing the Board's decision in *Skura*, *supra*, p. 4.

[6] See, also, *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18; *Hercules Powder Co.* v. *National Labor Relations Board*, 297 F. 2d 424, 433 (C.A. 5); *National Labor Relations Board* v. *Local 450, Int'l. Union of Operating Engineers*, 281 F. 2d 313, 317, n. 4 (C.A. 5), certiorari denied, 366 U.S. 909; *Building Material Teamsters, Local 282* v. *National Labor Relations Board*, 275 F. 2d 909, 913 (C.A. 2).

[7] See *John Hancock Mutual Life Insurance Co.* v. *National Labor Relations Board*, 191 F. 2d 483, 485–486 (C.A. D.C.); *National Labor Relations Board* v. *Lamar Creamery Co.*, 246 F. 2d 8, 9–10 (C.A. 5); *National Labor Relations Board* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 80 (C.A. 2).

But in addition, since the filing of charges with the Board is essential to the enforcement of the other rights specified in Section 7, it has long been recognized that an employer's interference with an employee's resort to Board processes may also constitute a violation of "'the general prohibition in' Section 8(a)(1) against coercion of 'employees in the exercise of the rights guaranteed in section 7.'" *Vogue Lingerie, Inc.* v. *National Labor Relations Board,* 280 F. 2d 224, 226 (C.A. 3).[8]

What has been said about employer intimidation must apply with equal force to union interference with protected activities: "What would be the value of the detailed rights given in § 7 if employees were afraid to assert them?" *National Labor Relations Board* v. *Whitfield Pickle Co.,* 374 F. 2d 576, 583 (C.A. 5). One of the express congressional objectives in adding Section 8(b)(1)(A) to the Act in 1947, making it an unfair labor practice for a union to restrain or coerce employees in the exercise of Section 7 rights, was to impose upon union conduct restric-

[8] See, also, *Gibbs Corp.*, 131 NLRB 955, 963, enforced, 308 F. 2d 247 (C.A. 5); *Pacific Intermountain Express Co.*, 110 NLRB 96, 108–109, enforced, 228 F. 2d 170 (C.A. 8), certiorari denied, 351 U.S. 952.

Similarly, it has been held that an employer violates Section 8(a)(1) of the Act by encouraging or inducing employees to withdraw charges filed with the Board, *Clearfield Cheese Co.*, 106 NLRB 417, 418, enforced, 213 F. 2d 70 (C.A. 3); by deterring employees from testifying truthfully in Board proceedings, *Jackson Tile Manufacturing Co.*, 122 NLRB 764, 766, enforced, 272 F. 2d 181 (C.A. 5); or by demanding, in advance of trial, copies of statements which employees had given to Board investigators, *Texas Industries, Inc.*, 139 NLRB 365, 367–368, enforced, 336 F. 2d 128, 132–133 (C.A. 5).

tions comparable to those Section 8(a) imposes on employers.[9] In *International Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 366 U.S. 731, 738, this Court noted the legislative design to seek relative parity between employers and unions in their conduct toward employee-members, and concluded that "[i]t was the intent of Congress [in adding Section 8(b)(1)(A)] to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."

The fact that Congress originally provided a specific bar against *employer* interference with the right to file charges with the Board (Section 8(a)(4), *infra,* p. 39) but did not later specifically outlaw *union* interference does not militate against finding such a bar in the general terms of Section 8(b)(1)(A). "Section 8(a)(4), and its predecessor in like terms in the original Wagner Act of 1935 only made clear that which was implicit in original Section 8(1)," which, like Section 8(b)(1)(A), broadly prohibits restraint of employees in the exercise of their Section 7 rights. *Roberts* v. *National Labor Relations Board,* 350 F. 2d 427, 428 (C.A.D.C.).

In light of this Court's oft-repeated caveat that, in appraising the delicate task ofdrafting labor legislation, attention must focus on the overall plan rather than merely on the literal terms that resulted, *e.g., National Labor Relations Board* v. *Allis-Chalmers*

[9] See, *e.g.*, 93 Cong. Rec. 4021, 2 *Leg. Hist. LMRA, 1947,* p. 1025 (remarks of Sen. Taft); 93 Cong. Rec. 4016, 2 *Leg. Hist. LMRA, 1947,* p. 1018 (remarks of Sen. Ball).

Mfg. Co., 388 U.S. 175, 179–180, the court below attributed too much significance (R. 37) to the deletion in conference of a paragraph that would have explicitly reached the union conduct here involved by making it an unfair labor practice for a union:

> to fine or discriminate against any member, or to subject him to any * * * penalty, on account of his having criticized, complained of, or made charges or instituted proceedings against, the organization or any of its officers, or on account * * * of his having supported or failed to support any proposition submitted to the labor organization, or to citizens generally, for a vote. [Sec. 8(c)(5) of the Hartley bill, H.R. 3020, 80th Cong., 1st Sess., 1 *Leg Hist. LMRA*, 1947, p. 180.]

As the court noted in *Roberts, supra,* this provision would have been so much broader than a mere prohibition against union discipline for filing charges that its deletion throws little light on Congress's view of that particular practice. Moreover, as the court added, "the legislators may have decided it was unnecessary to make specific that it might be an unfair labor practice under Section 8(b)(1) to fine or discriminate against a member for filing a charge against a union." 350 F. 2d at 428, n. 1.

2. Earlier this Term this Court held in *Nash, supra,* that the structure and objectives of the National Labor Relations Act must preclude the States from taking "coercive actions which the Act forbids employers and unions to take against persons making

charges * * *". [10] The Court explained that employers and unions alike are forbidden by the Act to engage in coercive activities which have "a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." [11]

The Board has long followed this approach. In other cases it has held that a union restrains and coerces, in violation of Section 8(b)(1)(A) of the Act, when it threatens an employee with physical violence or job loss because he has filed charges with the Board or has decided to give testimony in a Board proceeding.[12] The instant case is merely another application of this statutory policy. The general test of when Section 8(b)(1)(A) is violated is whether the misconduct may reasonably tend to intimidate employees in the exercise of rights protected by the Act. *Local 542, International Union of Operating Engineers* v. *National*

[10] In *Nash*, 389 U.S. at 239, the Court held that Florida's policy of denying unemployment compensation to employees who filed unfair labor practice charges against their employer restrained employees in the exercise of their right to file charges with the Board, and hence was in conflict with, and thus barred, by the Act.

[11] 389 U.S. at 239. In the course of the discussion of this point, the Court specifically cited the decision in *Roberts* v. *National Labor Relations Board*, 350 F. 2d 427 (C.A.D.C.), discussed, *supra*, pp. 13–14, in which the District of Columbia Circuit sustained the Board's treatment of *Skura*-type cases.

[12] See *Textile Workers Union of America*, 108 NLRB 743, 749, enforced in relevant part, 227 F. 2d 409, 411 (C.A.D.C.); *Int'l Ass'n of Bridge Workers, Local 84*, 112 NLRB 1059, 1060; *Bordas & Co.*, 125 NLRB 1335, 1336, enforced, 288 F. 2d 132 (C.A.D.C.); *Local 450, Operating Engineers*, 122 NLRB 564, 568, enforced, 281 F. 2d 313, 317 (C.A. 5), certiorari denied, 366 U.S. 909.

Labor Relations Board, 328 F. 2d 850, 852–853 (C.A. 3). For a union to fine or expel a member for filing charges with the Board tends to restrain or coerce him and others like him in the exercise of their rights no less than those other forms of reprisal. As the Board pointed out in *Skura, supra*, 148 NLRB at 682, there "can be no doubt that a fine is by nature coercive, and that the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges." Similarly, expulsion from the union would tend to have the same effect, since it entails loss of union strike fund, pension, and insurance benefits; loss of a voice in the decisions made by the collective bargaining representative; and various social pressures. See *Cannery Workers Union (Van Camp Sea Food Co.)*, 159 NLRB 843, 846.

3. Nor does the Act sanction coercive union discipline where, as here, the union's rule purports to postpone rather than completely prevent resort to the Board. Nothing in the Act requires an employee to exhaust internal union remedies before filing a charge with the Board.[13] In *Skura*, the Board concluded that, because of the overriding public interest involved,

[13] On the contrary, Section 10(a) of the Act provides that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Only recently, this Court specifically recognized "that the National Labor Relations Act does not require prior exhaustion of internal union remedies." *Wirtz* v. *Local 125, Laborers' International Union*, No. 58, O.T. 1967, decided January 15, 1968.

no private organization like a labor union should be recognized as having the authority to regulate access to the Board in this way.[14] Hence, to permit an employee-member to be exposed to union discipline if he does not exhaust the union's remedies impermissibly tends to coerce him to forego his statutory right to invoke Board processes as promptly as he considers necessary.

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4. A subsidiary issue is presented by the holding of the court below that the original charges filed by Holder did not adequately allege that Local 22 had interfered with the exercise of rights guaranteed by Section 7 (R. 35–36). First, we question whether this inquiry was even relevant. The approach taken by the court below would make protection for resort to the Board turn on such imponderables as whether the General Counsel decided to pursue the charge or whether a court might later say the charge was drafted with sufficient artistry. The right of access to the Board is "too precious a right to be curbed by the risky prediction" that the charge adequately invokes Section 7 rights. Cf. *Ryan* v. *International Brotherhood of Electrical Workers,* 361 F. 2d 942, 944 (C.A. 7). It seems far more in keeping with sound public policy to accord protection to the union member "as long as his [charge] is brought honestly and in good faith." Summers, *Legal Limitations on Union Discipline,* 64 Harv. L. Rev. 1049, 1068 (1951); see, also, note 19, *infra,* and accompanying text.

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[14] The policy of the Act is to promote promptness in filing charges, since it forbids issuance of a complaint based on conduct occurring more than six months earlier. Section 10(b), 29 U.S.C. 160(b).

Assuming *arguendo* the validity of the court's view that the recital in the charge of a deprivation of Section 7 rights is a relevant factor in determining whether the Unions' subsequent expulsion of Holder for filing the charge constituted an unfair labor practice, the court nonetheless erred in concluding that the charge was inadequate. The record before the court showed that Holder alleged in his charge that Local 22 "had violated Section 8(b)(1)(A) and (2) of the Act by causing U.S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment by U.S. Lines" (R. 3, 5). The references to "protected activity" and Section 8(b)(1)(A) make it apparent that an impairment of Section 7 rights was alleged. Moreover, the charge itself specifically recited that the Local "[b]y these and other acts," had restrained and coerced employees (R. 28). No greater specificity was required. "The charge is not proof. It merely sets in motion the machinery of an inquiry. * * * The charge does not even serve the purpose of a pleading." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. Thus, for the purpose of instigating an investigation into whether Section 7 rights had been violated, the charge was more than adequate.

B. UNION DISCIPLINE FOR FILING CHARGES WITH THE BOARD WITHOUT FIRST EXHAUSTING INTERNAL UNION PROCEDURES IS NOT PRIVILEGED AS AN INTERNAL UNION MATTER BEYOND THE SCOPE OF SECTION 8(b)(1)(A)

In *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, this Court sustained the Board's analysis that Section 8(b)(1)(A)

of the Act does not prevent a union from imposing fines on members who cross a union picket line designed to implement an authorized strike. The Court noted that the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *'" (*id.* at 181). The Court further found that a limitation on the union's right to discipline strikebreakers would be inconsistent with "the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status" (*id.* at 195). But, as *Allis-Chalmers* itself warns (*id.* at 178–179), excessive literalism is incompatible with sound administration of the labor relations statutes. For this reason the Board, as the agency primarily charged with applying these policies in concrete factual situations, has been "discriminating"[15] rather than mechanical in applying Section 8(b)(1)(A) and its proviso. The Board has properly and reasonably determined that union discipline for filing a charge with the Board without exhausting intra-union procedures is not justified by any of the considerations underlying the *Allis-Chalmers* decision.

A union rule requiring exhaustion of union pro-

[15] *Price* v. *National Labor Relations Board*, 373 F. 2d 443, 446 (C.A. 9), pending on petition for certiorari, No. 339, this Term.

cedures extends beyond the area of legitimate internal union affairs which both the legislative history of the Taft-Hartley amendments [16] and the terms of the proviso in Section 8(b)(1)(A) (pp. 9, 39–40, *infra*) indicate Congress intended to leave largely free from governmental regulation. Although requirements that a union member exhaust internal union procedures before resorting to a court or other outside tribunal are not uncommon,[17] this phenomenon does not establish their lawfulness. As Archibald Cox has pointed out:[18]

> This restriction is against public policy. No private organization should be permitted to restrict any person's access to courts of justice. The right should be as absolute as the right to appear in court as a witness, to petition on a legislature, or to communicate with a member of Congress.[19]

Another frequent commentator on these questions, Professor Clyde Summers, has explained:[20]

> * * * Labor's traditional distrust of the judiciary has caused many unions to prohibit mem-

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[16] The history is summarized in *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, *supra*, 388 U.S. at 184–192.

[17] *Disciplinary Powers and Procedures in Union Constitutions*, Bulletin No. 1350, U.S. Dept. of Labor, Bureau of Labor Statistics (1963), pp. 18–19, 32–33.

[18] Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839 (1960).

[19] See, also, *In re Quarles*, 158 U.S. 532; *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 69 ("the courts cannot tolerate the expulsion of a member of a union * * * merely because he invokes the process of the courts to protect his rights—even if he does so mistakenly.") (Jackson, J., dissenting).

[20] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1067–1068 (1951).

> bers from resorting to the courts until all appeals within the union have been exhausted. In a number of cases, members have been expelled for attempting to enjoin union officers from such predatory practices as selling jobs, demanding kick-backs, destroying resistant locals, and embezzling union funds. The courts have reciprocated by looking with a jaundiced eye upon all discipline which restricts the member's freedom to use the judicial process and, in these flagrant cases, have freely protected the individual member from discipline. Even in more doubtful cases * * *, the courts have also given full protection.
>
> Legal relief in these cases is based upon preserving free access to the courts and is, therefore, not limited to those suits in which a member has a good cause of action. He will be protected as long as his suit is brought honestly and in good faith * * *. [Footnotes omitted.][21]

In *Skura, supra,* 148 N.L.R.B., at 682–683, the Board took this same position and concluded that "the overriding public interest" in unimpeded access

[21] It is important at this juncture to note a distinction which has particular relevance for and is more fully discussed in connection with the final point in this argument, pp. 28–37, *infra.* Significantly different from a union rule against resort to the courts or other outside tribunals without exhausting internal union remedies is "the judicial doctrine that a court will not entertain a member's action against a labor organization until he has exhausted all adequate remedies within the organization. The rule is one of judicial administration. It applies not only to suits involving the internal affairs of all forms of voluntary association, but also to actions upon ordinary contracts, including collective bargaining agreements." Cox, *supra,* 58 Mich. L. Rev. at 839 (footnotes omitted). This judicial doctrine is the analogue to the exhaustion doctrine developed in connection

to the Board places coercive attempts to regulate that access beyond the lawful interest of a labor organization.

Contrary to the view of the court below, a union rule requiring the exhaustion of internal union procedures before resorting to the Board would impede "the normal and proper administration of the Act" (R. 38).[22]

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with review of the action of administrative agencies. It rests upon the policies that: "union appellate tribunals may take corrective action, thus reducing the burden on the courts"; "the benefit of the expert judgment of these tribunals might aid courts in making more responsible decisions"; the autonomy of unions is strengthened by giving "the union full responsibility and opportunity to correct its own mistakes." Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L.J. 175, 207 (1960). Unlike the union rule on exhaustion, which has a deterrent effect on a member's resort to a court, the judicial doctrine merely permits the court, after the member has freely resorted to it, to make a judgment as to whether the issue presented might adequately be resolved under the union's own procedures; and, if so, to remit the member to those procedures. If, on the other hand, the court concludes that exhaustion of internal union procedures would be futile, or that those procedures would be inadequate, the judicial doctrine leaves it free to entertain the member's suit forthwith. The courts have created many exceptions to the exhaustion rule, and "by applying the exceptions [they] have sapped the rule of almost all vitality except in random cases." Summers, *op. cit.*, 70 Yale L.J. at 210, and 207–210. See, also, Wollett and Aaron, *Labor Relations and the Law* (Little Brown, 1960), pp. 74–77; Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1086–1092 (1951).

[22] The court recognized that, had the union rule flatly barred the filing of charges with the Board, union discipline to enforce it would constitute restraint and coercion prohibited by Section 8(b)(1)(A) (R. 38). See, also, *Philadelphia Moving Picture Machine Operators Union, Local 307* v. *National Labor Relations Board*, 382 F. 2d 598, 600 (C.A. 3). It concluded that a different conclusion was warranted where the rule merely re-

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights * * *. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce * * *." *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 362. Thus, although the individual's charge triggers the unfair labor practice proceeding, the scope of the proceeding is not limited to the violations there alleged; the complaint may encompass numerous related unfair labor practices discovered in the course of investigating the charge.[23] Once properly invoked, the Board's power to adjudicate and remedy unfair labor practices may not be restricted by the private agreement of the parties.[24] Moreover, the Board has broad authority to formulate such remedies as will effectuate the policies of the Act.[25]

Accordingly, even if a union member who believes the union has committed an unfair labor practice

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quired that union procedures be exhausted, since such a rule gives the union "a fair opportunity to correct its own wrong before the injured member [has] recourse to the Board."

[23] *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 306–309; cf. *Wirtz* v. *Local No. 125, Laborers' International Union, supra.*

[24] See *Lodge 743, IAM and National Labor Relations Board* v. *United Aircraft Corp.*, 337 F. 2d 5, 8–11 (C.A. 2), certiorari denied, 380 U.S. 908; *International Union of Electrical Workers, Local 613* v. *National Labor Relations Board*, 328 F. 2d 723, 727 (C.A. 3); *National Labor Relations Board* v. *Threads, Inc.*, 308 F. 2d 1, 8 (C.A. 4); *National Labor Relations Board* v. *Local 450 Int'l Union of Operating Engineers*, 275 F. 2d 413, 418 (C.A. 5).

[25] See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 188.

pursues all intra-union procedures, and even if he achieves some response that is personally satisfactory, this would leave the objectives of the National Labor Relations Act only partially fulfilled. The rights of other employees in the unit who might be the victims of the same union policies now or in the future would be left unprotected; nor is there any guarantee that the individual's conception of an adequate remedy for the deprivation of his statutory rights will coincide with those of the Board, which is charged by Congress with administering the Act in the public interest.

Moreover, an individual union member's charge against his union is often coupled with a corresponding charge of job discrimination against the employer—as was Holder's here (R. 27–28). In a Board proceeding on such charges, both the employer and the union may be made parties, and in this posture the questions of the motives of both can be resolved in a single proceeding; comprehensive and coordinated remedies may then be imposed—including reinstatement to full job rights, backpay for all wages lost, a cease-and-desist order against repetition of the unfair labor practices by either party, and the posting of appropriate notices. Obviously, these issues cannot be fully explored, nor can such effective remedies be provided, in an internal union proceeding to which the employer is not a party.

In short, a requirement that the individual union member exhaust internal union procedures is not likely to be conducive to attainment of the aims of the National Labor Relations Act or to resolution of the problems in a manner which comports with the policies

of the Act.[26] Indeed, to require such exhaustion involves a grave danger that the individual member may never get to the Board at all.[27]

There can be no justification for requiring a union member to exhaust inadequate internal procedures while public processes wait—perhaps never to be invoked if the member simply tires and gives up in the course of pursuing his intra-union remedies.

Nor are these undesirable consequences averted by suggesting, as did the court below, that the member's right to file charges with the Board would only be postponed until after a "practical and reasonable" resort to internal remedies, and that "[o]f course, a court or an administrative agency will determine for itself whether the alleged intra-union remedy is in fact available and whether resort to it would impose unreasonable delay or hardship upon the complainant"

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[26] Where, as here, the member charges a union officer with causing the employer to discriminate against him because of his role in an intra-union conflict, the possibility of securing an impartial hearing or any remedy within the union is particularly remote. See Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1087–1088 (1951); Vorenberg, *Exhaustion of Intraunion Remedies as a Condition Precedent to Appeal to the Courts*, 2 Lab. L. J. 487, 494 (1951). Cf. *Calagaz* v. *Calhoon*, 309 F. 2d 248, 259–260 (C.A. 5).

[27] As Professor Summers pointed out:

> * * * the protracted process of appealing through a hierarchy of officials, ending with the union convention, may take years. Dissenters will have been silenced, opposition groups disintegrated, corruptly elected officials entrenched in power, and union treasuries plundered * * *.

Summers, *The Usefulness of Law in Achieving Union Democracy*, 48 Amer. Econ. Rev. 44, 47 (May 1958).

(R. 38). This approach assumes that, where exhaustion of intra-union remedies would impose unreasonable delay or hardship, the member may, notwithstanding the union exhaustion rule, resort to the Board or the court immediately and any union discipline for violating the rule will be set aside as invalid. The flaw in this formulation is that it compels the member to guess whether the court or the Board would in fact find that his case falls in the exceptional category; and, should he guess wrong, the union's discipline against him for failing to exhaust internal union procedures would stand. In the Board's judgment, the existence of this risk is calculated to chill the exercise of a member's right to an immediate Board remedy, and induce him instead either to forgo his grievance or pursue a futile union procedure. Cf. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 239. As the Seventh Circuit stated in *Ryan* v. *Int'l Bro. of Electrical Workers,* 361 F. 2d 942, 946, certiorari denied, 385 U.S. 935: "The right of free access to our courts is too precious a right to be curbed by the risky prediction that the judge's discretion may, like a lucky role of dice, turn up in favor of the suitor." [28]

For these reasons, the Board properly concluded that a unon rule which requires a member to exhaust inter-

[28] In *Ryan*, union members who had been expelled for filing suit against the union without first exhausting internal union remedies brought an action in the district court, pursuant to Section 102 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. 412), to nullify their expulsion on the ground that the union's exhaustion requirement was contrary to Section 101(a)(4) of that Act (discussed, *infra*, pp. 28–37). The Seventh Circuit agreed that the expulsion was invalid.

nal union remedies before filing charges with the Board is contrary to the policies of the Act and hence does not fall within the area of internal union affairs which Congress intended to exclude from the reach of Section 8(b)(1)(A). As Judge Fahy, writing for the District of Columbia Circuit, explained, in sustaining the Board's position: "by filing a charge * * * [the union member] stepped beyond the internal affairs of the Union and into the public domain. The Act, in enabling the Board to inhibit the Union from penalizing him for doing so keeps open the channels created by Congress for the administration of a public law and policy." *Roberts* v. *National Labor Relation Board,* 350 F. 2d 427, 429.[29]

[29] The question whether a union rule or policy is within or without the area of legitimate union concern, although relatively easy to answer in the situation presented in *Allis-Chalmers*, *supra*, and in the situation here, becomes more difficult in other situations. Thus, in *United Steel Workers of America* (*Richard C. Price*), 154 NLRB 692, and *Tawas Tube Products, Inc.*, 151 NLRB 46, the Board held that a union does not violate Section 8(b)(1)(A) by disciplining a member for filing with the Board a petition to decertify his union as bargaining representative, under Section 9(c)(1)(A)(ii) of the Act. In *Cannery Workers Union* (*Van Camp Sea Food Co.*), 159 NLRB 843, 849–850, the Board has recently given a full explanation of why it regards these cases as materially different from *Skura*-type cases like the present one. Currently pending before the Court in No. 399, *Price* v. *National Labor Relations Board*, is a petition for a writ of certiorari to review the decision of the Ninth Circuit, 373 F. 2d 443, sustaining the Board's analysis distinguishing the lawfulness of union discipline in these two types of situations. It is unnecessary, however, for the Court in deciding the instant case to consider the merits of the Board's approach to the question presented in *Price*. See *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, 647.

C. SECTION 101(a)(4) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT DOES NOT AUTHORIZE UNION DISCIPLINE OF A MEMBER FOR FILING CHARGES WITH THE BOARD WITHOUT EXHAUSTING INTERNAL UNION PROCEDURES

The court below found that Section 101(a)(4) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411(a)(4)) ("LMRDA") "makes it mandatory" (R. 39) that the Board conclude that labor organizations are privileged to expel members for filing charges with the Board without exhausting internal union procedures. We submit that the court's reliance on this provision is misplaced. This section was not designed to confer any authority or immunity on labor unions, and its proviso is addressed not to unions but to courts and administrative agencies.

Section 101(a)(4) is part of the "Bill of Rights of Members of Labor Organizations" and is entitled "Protection of the Right to Sue." It provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings * * *.

The location of this provision in Title I of the LMRDA, rather than in Title VII which contains the

amendments to the National Labor Relations Act, immediately suggests that this provision was not intended to have any effect on the rights and remedies created under the latter statute and certainly not to constrict a union member's protections thereunder. This assumption is confirmed by Section 103 of Title I ("Bill of Rights") of the LMRDA (29 U.S.C. 413), which provides that "[n]othing contained in this [title] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal * * *."[30]

Moreover, the language of the opening portion of Section 101(a)(4)—"No labor organization shall limit the right of any member thereof to institute an action in any court, or in any proceeding before any administrative agency"—demonstrates that the main thrust of the section is to prohibit, as a matter of federal law, those limitations by unions which the courts had generally regarded as contrary to public policy (see pp. 20–21, *supra*). Viewed in this light, the exhaustion proviso was not intended, as the court below held it was, to sanction union discipline of a member who has not exhausted internal union procedures for at least four months. Rather, the proviso is concerned with fixing the outer limits on the traditionally recognized doctrine of exhaustion of remedies applied by

[30] See *Grand Lodge of Int'l Assoc. of Machinists* v. *King*, 335 F. 2d 340, 347 (C.A. 9), certiorari denied, 379 U.S. 920; cf. *Figueroa* v. *Nat'l Maritime Union*, 342 F. 2d 400, 405 (C.A. 2). See also Section 603(b) of Title VI of the LMRDA (29 U.S.C. 523), which provides that nothing in the earlier titles shall be construed "to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

courts and other agencies (see n. 21, *supra*); that is, the proviso advises public tribunals that *they* may in their discretion continue to stay their hands when they consider it appropriate, subject to the newly added caveat: "but not to exceed" four months. "The proviso does authorize, indeed it may require, the agency or court to which the member comes for relief to withhold the exercise of its authority—for four months if reasonable internal procedures are available and are not earlier exhausted—in deference to the congressional desire that a solution be reached by means other than at the hands of public authorities. Approval of such restraint by agency or court is quite different, however, from freeing the Union itself to impose a fine for failure of a member to exhaust such procedures." *Roberts* v. *National Labor Relations Board,* 350 F. 2d 427, 430 (C.A. D.C.). Accord: *Detroy* v. *American Guild of Variety Artists,* 286 F. 2d 75, 78 (C.A. 2), certiorari denied, 366 U.S. 929; *Ryan* v. *Int'l Bro. of Electrical Workers,* 361 F. 2d 942, 946 (C.A. 7), certiorari denied, 385 U.S. 935.[31]

An understanding of the legislative history of Section 101(a)(4) and its proviso demonstrates the soundness of this interpretation, and authoritative comment confirms it. The bill that was originally passed by the Senate set forth the protection of the

[31] See, also, *Calhoon* v. *Harvey,* 379 U.S. 134, 144–145 (concurring opinion); *Simmons* v. *Avisco, Local 713, Textile Workers Union,* 350 F. 2d 1012, 1016, n. 4 (C.A. 4); *Burris* v. *Int'l Bro. of Teamsters,* 224 F. Supp. 277, 280 (W.D. N.C.); *Deluhery* v. *Marine Cooks & Stewards,* 199 F. Supp. 270, 274 (S.D. Cal.). Contra: *Sheridan* v. *United Bro. of Carpenters, Local 626,* 306 F. 2d 152, 160 (C.A. 3, concurring opinion of Hastie, J.).

right to sue in language substantially similar to that in the present law but provided that a union member "may be required" to exhaust internal remedies, "but not to exceed a six-month lapse of time". Section 101 (a)(4), S. 1555, 86th Cong., 1st Sess., 1 *Leg. Hist. LMRDA 1959,* p. 520. The House Labor Committee, however, reported out a proposal taking a somewhat different approach on this question. See H. Rep. No. 741, 86th Cong., 1st Sess. 7, 30, 1 *Leg. Hist. LMRDA, 1959,* pp. 765, 768. This bill, H.R. 8342, contained a proviso declaring that a union member "shall be required to exhaust the reasonable remedies available" within his union, without specifying any time limit on the required exhaustion. See 1 *Leg. Hist. LMRDA, 1959,* p. 698. Shortly thereafter, Representatives Landrum and Griffin introduced their substitute for the Committee bill, cast in the language which was ultimately adopted by both Houses, providing that the union member "may be required" to exhaust reasonable intraunion remedies for up to four months.

For our purposes, of course, the decisive inquiry is what significance should be attributed to the existence of the proviso, to the use of the verb "may" be required, and to the choice of a four-month limit. Although in the debates on these questions some legislators were occasionally unclear or imprecise in analyzing the purposes and effects of this section, reading the various statements in the context of the overriding objective of securing and protecting the union member's right of recourse against his union demonstrates that the court below was mistaken in treating this proviso as dispositive.

We submit that insofar as there was a congressional consensus on the question of the applicability of the proviso, it was intended not to sanction mandatory exhaustion restrictions in union constitutions but to validate, with some limitation, the judicial doctrine of exhaustion. During the debate on the respective merits of the Committee bill and the Landrum-Griffin substitute, Representative (now Speaker) McCormack spoke out in favor of the unlimited formulation in the Committee bill, explaining (105 Cong. Rec. 15835, 2 *Leg. Hist. LMRDA, 1959,* pp. 1666–1667):

> * * * the committee concluded that to leave the problem in the hands of the courts where it presently resides was entirely reasonable. The doctrine of exhausting internal remedies has been uniformly accepted by the courts of this country, both State and Federal, over a period of many years, and has been required by some courts even in the absence of such provision in union constitutions making it a prerequisite to court action.[32]

He carefully defined the objective of the Committee's decision to omit a time limit on exhaustion in terms that demonstrate that the focus was the activity of the courts and not of the unions (*ibid.*):

> * * * The absence of a time limitation for exhausting internal union procedures in the committee bill is simply a restatement of existing applicable State and Federal law which no one, to our knowledge, has attacked as in any way unfair or inequitable.

Congressman O'Hara, also arguing in favor of the

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[32] *Accord*, 105 Cong. Rec. 15536, 2 *Leg. His. LMRDA, 1959*, p. 1572 (remarks of Rep. Thompson).

Committee approach, explained that its bill merely "restate[d] the common law doctrine that a member before bringing suit should exhaust such available remedies * * * as are reasonable under the particular circumstances of his case." He then suggested that the Landrum-Griffin proposal for a four-month limit would be unnecessary since the courts in either case "will continue to apply their own independent judgment on this matter" (105 Cong. Rec. 15689–15690, 2 *Leg. Hist. LMRDA, 1959,* p. 1632).

Also supporting the Committee bill, Congressman Foley explained that the principal difference between the two measures was that the Committee proviso would have been mandatory while the Landrum-Griffin formulation "is discretionary since it does not require the exhaustion of internal remedies before suit is instituted * * *"; his objection to this treatment was that it was incompatible with the judicial doctrine that such an action "is not ripe for judicial decision" until the union's grievance machinery has been utilized. (105 Cong. Rec. 15563, 2 *Leg. Hist. LMRDA, 1959,* p. 1600).

This analysis accurately reflects the pervasive congressional design to insure that the right to resort to public tribunals be relatively unfettered. The determination to accept the Landrum-Griffin substitute despite the illumination of the two important respects in which it differed from the Committee bill coincides with this predominant concern for the rights of the union member rather than for the interests of the organization. The Congress adopted a proviso that left room for *judicial* discretion on whether to remit the

member to available union remedies, without intending to codify what might or might not have been a general rule to *require* exhaustion.[33] Then, underscor-

[33] An argument might be made that the use of the verb "may" was, on the contrary, understood to authorize labor unions to insist that their members exhaust internal procedures and to require that the courts (and the Board) respect this requirement. Such a suggestion would cite the fears, expressed by certain legislators, that the equivalent provision of S. 1555, which had passed the Senate with a six-month exhaustion requirement, might foreclose union members from filing charges with the Board, because of the six-month limit imposed by Section 10(b) of the NLRA. See 105 Cong. Rec. 10095 (Sen. Goldwater), 14344–14345 (Reps. Landrum and Griffin), 15530 (Rep. Griffin); 2 *Leg. Hist. LMRDA, 1959*, pp. 1280, 1520, 1566–1567. Because Section 101(a)(4) of the Landrum-Griffin Bill reduced the exhaustion provision from six to four months, it may be argued that, unless Congress intended to permit unions to impose discipline on their members for filing unfair labor practice charges without exhausting internal union procedures, no such accommodation of the statutory time periods would have been necessary. A more likely explanation is that some legislators erroneously supposed that there was an exhaustion requirement in Board proceedings, and others, who knew better, nonetheless sought to eliminate any appearance or possibility of conflict between the two statutory periods. See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 870 (1960) (concluding that Congress was attempting to resolve an "illusory problem"); Hickey, *The Bill of Rights of Union Members*, 48 Geo. L.J. 226, 248–249 (1959). Moreover, it is important to note that the union members' "Bill of Rights," as it was eventually enacted, represented a hastily drafted compromise between those who desired to encourage democratic self-government within labor organizations by leaving the courts wide latitude to require exhaustion of internal union remedies, and those who were not sympathetic to that doctrine and therefore hoped to see it restricted as much as possible. Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839–841 (1960). To those who were hostile to the doctrine, any reduction in the exhaustion period would have seemed desirable.

ing this objective, Congress fixed a four-month limit on the authority of the courts to apply such a rule of judicial restraint because important public interests are at stake in the prompt adjudication of a union member's complaint that his labor organization is acting unlawfully.

The definitive explanations of the legislators who played the preeminent part in shaping this legislation reinforce this appraisal. Thus, Representative Griffin, in making the final summary of his bill before the House overwhelmingly endorsed the conference decision to adopt his approach, recapitulated (105 Cong. Rec. 18152, *Leg. Hist. LMRDA, 1959,* p. 1811):

> Section 101(a)(4) * * * is designed to protect the right of a union member to resort to courts and administrative agencies. The proviso which limits exhaustion of internal remedies is not intended to impose restrictions on a union member which do not otherwise exist, but rather to place a maximum on the length of time which may be required to exhaust such remedies. In other words, existing decisions which require, or do not require, exhaustion of such remedies are not to be affected except as a time limit of four months is super-imposed. Also, by use of the phrase "reasonable hearing procedures" in the proviso, it should be clear that no obligation is imposed to exhaust procedures where it would obviously be futile or would place an undue burden on the union member.

Representative Griffin then added pointedly (*ibid.*):

> Furthermore, the proviso was not intended to limit in any way the right of a union member under the Labor-Management Relations Act of

1947, as amended, to file unfair labor practice charges against a union, or the right of the NLRB to entertain such charges, even though a 4-month period may not have elapsed.

In reporting back to the Senate on the results of the conference, Senator John F. Kennedy conveyed a similar theme (105 Cong. Rec. 17899; 2 *Leg. Hist. LMRDA, 1959,* p. 1432): "The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization."[34] He added: "So long as the union member is not prevented

[34] In the course of the same remarks, Senator Kennedy did observe that: "On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws. Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case."

This explanation is reconcilable with the immediately preceding point, quoted in the text, that the basic purpose of the Section is to insure the right of union members to resort to courts "without interference or frustration of that right by a labor organization." It merely underscores the point that the courts may continue to abstain from intra-union disputes—for up to four months—while they insist that the member resort to existing union grievance machinery.

He then also remarked, rather cryptically, that "the 4-month limitation in the House bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies." It is conceivable that Senator Kennedy was merely suggesting that the proviso is inapplicable to Board proceedings, since he immediately gave as an example

by his union from resorting to the courts, the intent and purpose of the 'right to sue' provision is fulfilled * * *." Finally, of special importance for resolution of the question now before the Court, he stated that the proviso was not intended to prohibit the "National Labor Relations Board * * * from entertaining charges by a member against a labor organization even though 4 months has not elapsed." [35]

Accordingly, contrary to the view of the court below, the Board's holding that the Unions violated Section 8(b)(1)(A) by expelling Holder for filing charges with the Board without first exhausting internal union remedies is in full accord with the purposes and effect of Section 101(a)(4) of the LMRDA; the proviso to that section was not intended to authorize union restrictions on access to the Board that handicap effectuation of the objectives of the National Labor Relations Act.

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of his meaning the ability of the Board to entertain charges before the passage of four months. Or, it might have been a method of obscuring the thrust of the proviso in order to soothe some legislators who disfavored any limitation on the judicial exhaustion requirement. See Cox, *Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839–841 (1960).

[35] The Senate later in the day voted 95–2 to accept the Conference Report. 105 Cong. Rec. 17919–17920, 2 *Leg. Hist. LMRDA, 1959*, p. 1453.

CONCLUSION

The judgment of the court below setting aside the Board's order should be reversed, and the case remanded with directions to enforce that order.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * * *
> >
> > (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
> >
> > * * * * *
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with

respect to the acquisition or retention of membership therein; * * *

* * * * *

Sec. 9. * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401, *et seq.*) are as follows:

Title I—Bill of Rights of Members of Labor Organizations

Sec. 101(a) * * *

(4) *Protection of the Right To Sue.*—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *.

* * * * * *

Sec. 103. Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

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No. 796

IN THE

Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD,
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v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RICHARD C. PRICE AS AMICUS CURIAE

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---

BRIEF FOR RICHARD C. PRICE AS AMICUS CURIAE

This brief on behalf of Richard C. Price, as *amicus curiae*, is filed pursuant to the written consent of the parties under Rule 42(2) of the Rules of this Court.

INTEREST OF AMICUS CURIAE

Richard C. Price was formerly an employee of Pittsburgh-Des Moines Steel Company, working at the latter's plant in Santa Clara, California. He was also a dues-paying member of United Steelworkers of

America, AFL-CIO, Local Union No. 4028, the union that represented employees at the Santa Clara plant.

On June 3, 1964, Price filed with the Regional Director of the Twentieth Region of the National Labor Relations Board a petition in which he sought the decertification of the Steelworkers as the bargaining representative of the Santa Clara plant employees. For filing the decertification petition, the Steelworkers, among other things, suspended Price from membership, and levied against him a fine of $500 which was subsequently withdrawn. Thereafter, upon unfair labor practice charges filed by Price against the Steelworkers, the Board held that the Steelworkers' disciplinary action against Price because he had invoked the Board's decertification procedures was not an unfair labor practice within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act. *United Steelworkers of America*, 154 NLRB 692. The Board's decision was subsequently affirmed by the Court of Appeals for the Ninth Circuit. *Price* v. *National Labor Relations Board*, 373 F.2d 443.

In July 1967, Price petitioned this Court for a writ of *certiorari* to review the Ninth Circuit's judgment. *Richard C. Price, Petitioner*, v. *National Labor Relations Board and United Steelworkers of America, AFL-CIO, Local Union No. 4028*, No. 399, October Term, 1967. Price's petition was not opposed by either the Board or the Steelworkers. See memoranda filed in No. 399. A ruling on Price's petition has not yet issued, however, and No. 399 is presently pending before the Court.

Price has a substantial interest in the outcome of this case. As the Board recognized in the memorandum it filed in No. 399, the issue in this case is

interrelated with the issue in Price's case. Each case presents the basic issue of whether a union violates Section 8(b)(1)(A) of the Act by taking disciplinary action against a union member for invoking the Board's processes. Although the two cases are factually distinguishable—this case involving the filing of an unfair labor practice charge with the Board, Price's case involving the filing of a decertification petition—the distinction is not meaningful. Thus, if the Court upholds the Board's position in this case, reversal of the Board's position in Price's case may reasonably be anticipated; if, on the other hand, the Court rejects the Board's position in this case, the result in Price's case would almost certainly be sustained.

ARGUMENT

1. The premises upon which the Board's decision in this case rests were set forth initially in the Board's earlier decision in *Local 138, International Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679. Succinctly stated, these premises are as follows: As the Board may proceed against unfair labor practices only in response to unfair labor practice charges filed with it, the freedom of individuals to file Board charges is crucial in the protection of rights protected by Section 7 of the Act and that freedom therefore is a right protected by Section 7; by expelling or fining a member for filing unfair labor practice charges a union "restrains" or "coerces" the member, within the meaning of Section 8(b)(1)(A), in the exercise of rights guaranteed by Section 7; the proviso to Section 8(b)(1)(A), which recognizes "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership,"

does not authorize a union to prevent or regulate access to the Board; and therefore, in view of the overriding public interest involved, a union rule which seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means.

The rationale of the *Skura* case was expressly approved by the Court of Appeals for the District of Columbia Circuit in *Roberts* v. *N.L.R.B.*, 350 F.2d 427. The court, in *Roberts*, said (350 F.2d at 429):

> In other words, by filing a charge with the Board [the union member] stepped beyond the internal affairs of the Union and into the public domain. The Act, in enabling the Board to inhibit the Union from penalizing him for doing so keeps open the channels created by Congress for the administration of a public law and policy. This is not, we agree with the Board, an inroad upon those internal union affairs left by the Act and its policy to be administered solely by the Union.

The Court of Appeals for the Third Circuit has likewise given its sanction to much of the Board's *Skura* doctrine. See *Philadelphia Moving Picture Machine Operators' Union, Local No. 307, I.A.T.S.E.* v. *N.L.R.B.*, 382 F.2d 598. The Board's reasoning in *Skura*, we submit, is sound and should be upheld by this Court. See also *Nash* v. *Florida Industrial Commission*, 389 U.S. 235.

2. Although in *Skura* the Board properly recognized that Section 8(b)(1)(A) protects an employees' Section 7 right to file unfair labor practice charges, and that a union may not prevent or regulate access to the Board's processes, the Board has nevertheless refused to apply the *Skura* principle where a union

disciplines a member because the member filed with the Board a petition under Section 9(c)(1)(A)(ii) of the Act seeking the union's decertification as a bargaining representative. *United Steelworkers of America*, 154 NLRB 692; *Tawas Tube Products, Inc.*, 151 NLRB 46. See also *Cannery Workers Union of the Pacific*, 159 NLRB 843. The full implication of the Board's *Skura* doctrine is shown, therefore, by an examination of the Board's illogical and inconsistent action with respect to decertification petitions.

In *United Steelworkers*, the Board explained that it would not apply the *Skura* doctrine in the decertification petition context because there is a "fundamental distinction between union disciplinary action aimed at the filing of charges seeking redress for asserted infringement of statutory rights, as in *Skura*, and union disciplinary action aimed at defending itself from conduct which seeks to undermine its very existence" (154 NLRB at 696). In *Cannery Workers*, the Board acknowledged that Section 9 proceedings ". . . are no less within the public domain," but amplified its view that a union had immunity to discipline a member who files a decertification petition: "In the fluid rather than fixed circumstances of a contest for support, the union and its adherents can perform their legitimate function effectively only if they are unified. To require them to tolerate an active opponent within their ranks would undermine their collective action and thereby tend to distort the results of the election. To permit the union and its members to discipline the hostile members is therefore not inconsistent with the purposes of the Act and *impinges on no legitimate interests of others* . . . ." [Emphasis added.] (159 NLRB at 850.)

Plainly, the Board's position with respect to decertification petitions misinterprets the statutory language,

misconceives the express intent of Congress, and subverts the policy of the Act. Section 7 of the Act gives to employees the right to join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; it likewise gives them the "right to *refrain from any or all of such activities.*" The "right to refrain" becomes illusory, we submit, if employees, having once designated a bargaining representative, are thereafter precluded from withdrawing the authority they have bestowed. The procedure set forth in Section 9(c)(1)(A)(ii) of the Act not only is a tool in effectuating the employee "right to refrain," but, as shown below, it also denotes an additional employee statutory right—the right to petition for union decertification.

The filing of a decertification petition sets in motion the Board's election procedures. In the words of Senator Taft, the purpose of a decertification petition, as provided for in Section 9(c)(1)(A)(ii) of the Act, is to afford employees an opportunity "to decertify a particular union" or "to decertify a union and go back to a nonunion status, if the men so desire." 93 *Daily Congressional Record* 1013, April 23, 1947, 2 *Legislative History of the Labor Management Relations Act of 1947*, p. 1013 (hereinafter cited as "*Leg. Hist.*"). Moreover, it is clear that Congress intended to grant employees preferring such "nonunion status" a *right* to petition the Board for the union's decertification. Thus, the pertinent House Report, H. Rep. No. 245, 80th Cong., 1st Sess. 35, 1 *Leg. Hist.* 326, stated with respect to Section 9(c)(1)(A)(ii):

> Although the terms of the Act would permit them to do so, the Board has denied to em-

> ployees who have designated an exclusive representative the *right* to have it decertified unless, at the same time, they subject themselves to control by another representative. The bill restores to employees this *right* of which the Board deprived them . . . . [Emphasis added.]

See also S. Rep. No. 105, 80th Cong., 1st Sess. 10, 25, 1 *Leg. Hist.* 416, 431; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 50, 1 *Leg. Hist.* 554. Statements by legislators show their understanding that the *right* to petition for decertification was given to "discontented" or "dissident" employees. 1 *Leg. Hist.* 653 (Congressman Klein); 1 *Leg. Hist.* 693-694 (Congressman Powell); 2 *Leg. Hist.* 1581 (Senator Murray).[1]

It is thus evident that there is just as much reason for engrafting on Section 7 a right to file a decertification petition as there is to engraft thereon, as the Board has done, a right to file charges. It is also clear that whether a charge or a petition be involved, there exists a paramount public interest in protecting the administrative processes of the Board from attack and undermining. In either case, the result must be dictated by what the Board said in *Skura* (148 NLRB at 682), "considering the overriding public interest involved . . . no private organization should be permitted to prevent or regulate access to the Board," and what the District of Columbia Circuit had in

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[1] The Congressional intent underlying Section 9(c)(1)(A)(ii) of the Act has been effectuated by Board rulings. See *Kraft Foods Company*, 76 NLRB 492, 495 (withdrawal from union membership held not prerequisite to filing a decertification petition); *Federal Shipbuilding & Drydock Company*, 76 NLRB 413 (employee's reason for filing decertification petition held immaterial); *Morse & Morse, Inc.*, 83 NLRB 383, 384 (union officer held competent to file decertification petition).

mind when it admonished in *Roberts* (350 F.2d at 429) that the "channels created by Congress for the administration of a public law and policy" cannot be allowed to be obstructed by union policy or action.

Nor is the Board's "preservation of the union's existence" rationale persuasive. At least in the case of large unions, the union's decertification at one plant does not necessarily jeopardize its overall existence. But even were it true that decertification would normally be tantamount to extinction, such a consideration cannot be deemed controlling. The Act is primarily concerned with employee rights and their protection; what rights labor organizations may have under the Act are subordinate to employee rights. Certainly, in the face of the explicit Section 7 employee right to refrain from collective activities, in the face of the explicit Section 9(c)(1)(A)(ii) employee right to decertify, the dubious interest of a union in perpetuating its life—nowhere stated to be a "right" under the Act—ought not to prevail.[2]

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[2] The Board's "preservation of the union's existence" reasoning would also sanction a union's disciplining a member for filing, or supporting, a typical Section 9(c)(1)(A)(i) *representation* petition. Such a petition to certify a rival union could prove just as effective as a decertification petition in undermining an incumbent union's "existence." Indeed, the Board appears to have acknowledged that it would permit an incumbent union to discipline a member for filing *any* petition. See *Cannery Workers, supra,* 159 NLRB at 849-850, where the Board broadly distinguishes cases arising under Section 8 of the Act from cases arising under Section 9.

On the other hand, should the Board attempt to distinguish between union discipline for filing, or supporting, a decertification petition and similar coercion for filing, or supporting, a certification petition, it would be inescapable that the right of employees to *change* bargaining agents would be regarded by the Board as superior to their right to *reject* such an agent.

CONCLUSION

It is respectfully submitted that the *Skura* doctrine, despite its illogical and inconsistent application by the Board, should be upheld, and that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: March 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

* * * *

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in in exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit ap-

propriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

* * * *

Sec. 9 (c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) . . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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Respondents.

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COUNTER-STATEMENT OF THE CASE.

Early in 1964, Edwin D. Holder, who was a member of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and of its Local No. 22,[1] lodged with that Local Union a complaint or charge accusing the Local's president of a violation of the parent union's constitution. After holding a hearing on this complaint, Local 22 decided that its president was not guilty of the alleged violation (R. 5; 16-17).

The parent union's constitution provides that in such an intra-union proceeding, the accusing member may appeal from an adverse decision (R. 6) and also provides that a member aggrieved by an action of a local union must first "exhaust all remedies and appeals within the Union, provided by this Constitution," before seeking relief in "any court or other tribunal outside of the Union" (R. 6).

Holder ignored these provisions. Shortly after the Local's decision exculpating its president, he immediately filed with the National Labor Relations Board an unfair labor practice charge (hereinafter sometimes referred to as the "previous charge") based on the same facts as had been the basis of the complaint he had previously filed with the Local (R. 5). The Regional Director for the Board's Second Region also dismissed Holder's unfair labor practice charge. Thereafter a complaint was filed with Local 22 against Holder, accusing him of violating the provisions of the International's constitution requiring that members exhaust internal remedies prior to seeking extra-union relief. This intra-union complaint resulted in Hold-

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[1] Hereinafter we sometimes refer to the parent union as the "International" and to both it and Local 22 as the "Respondents".

er's expulsion from Respondents and Holder then filed the unfair labor practice charge which gave rise to the instant proceeding.

The Board found that, by expelling Holder, Respondents committed the unfair labor practice defined in Section 8(b)(1)(A) of the Act and issued a broad remedial order. The United States Court of Appeals for the Third Circuit, in an opinion by Judge Hastie (R. 33 et seq.), denied enforcement of the Board's order and set that order aside (R. 41). On January 15, 1968, this Court granted the Board's petition for a writ of certiorari (R. 42).

The Statement of the Case contained in the Board's brief before this Court adequately summarizes the foregoing facts. That Statement also, at its very outset, describes Holder, at the time the operative facts occurred, as an employee of the United States Lines Company. By opening its Statement with this fact, the Board obviously seeks to focus this Court's attention upon it. But an understanding of the issues raised in this appeal requires that we here emphasize that Holder's relationship with United States Lines was not at all affected by termination of his membership in the Respondents. More particularly, Holder's expulsion from Respondents did not in any wise affect his status as an employee of United States Lines. Respondents interfered with none of his job rights. The fact that Holder happened to be employed by the United States Lines Company at the time Respondents expelled him has about as much significance, in the context of what actually occurred to Holder, as would be the fact that Holder happened to be a member of the Masons, the Elks, or NAACP.

Another instance in which the Board's Statement of the Case may lead to a wrong impression is the statement at page 3 summarizing the formal allegation made by Holder in the unfair labor practice charge, the filing of which led to his expulsion. That summary includes a quotation of

the formalistic language of the charge, namely, that the Local had caused "U. S. Lines to discriminate against him because he had engaged in certain protected activity with respect to his employment." This may obscure the relevant and important fact that the nature of the accusation contained in this charge had nothing to do with the reason for Holder's expulsion from the Respondents.[2] Both the Trial Examiner and the Board found that Respondents' reason or motive for expelling Holder from membership was solely that "Holder had filed unfair labor practice charges with the Board without first exhausting his internal union remedies" (R. 22, 24). It is thus clear that the Board's own finding is that it was the fact that Holder filed the previous charge, rather than the contents of that charge, that caused Respondents to expel him from membership.

Most simply stated the facts in this case are as follows:

Solely because Holder violated an internal union rule requiring a member to exhaust intra-union remedies prior to seeking Board or court relief, Respondents expelled Holder from membership without affecting his employment status.

On the basis of these facts, the Board would convict Respondents of an unfair labor practice.

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[2] It may not be amiss, however, to note also that the Regional Director dismissed this charge because of lack of evidentiary support therefor, as noted in footnote 3 of the Board's brief. We have been unable to find anywhere in the record support for the statement in that footnote that Holder's charges were predicated on the allegations that the alleged discrimination against him was "because of his intra-union opposition to the president of Local 22, and that Local 22 had thereafter unlawfully refused to process his grievance relating to the demotion."

SUMMARY OF ARGUMENT.

(1) Holder was expelled from Respondents for violating a provision of Respondents' constitution requiring that members exhaust intra-union remedies prior to seeking extra-union relief. His employment status was not affected by this expulsion. A provision in a union's constitution and bylaws requiring exhaustion of internal union remedies clearly constitutes an internal union rule governing what a member may or may not do as a condition of retaining his membership. Accordingly, and pursuant to the plain meaning, the clear legislative history, and the governing case authority, the lower Court correctly concluded that Holder's expulsion by Respondents was not an unfair labor practice under Section 8(b)(1)(A) of the Act. This Court's decision in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), permits of no other result.

(2) Even assuming that by expelling a member without affecting his status as an employee a union could violate Section 8(b)(1)(A) of the Act, no such violation can be found on the basis of the instant record, since there is no evidence that Holder's expulsion interfered with his engaging in activity of the kind protected by Section 7 of the Act. To the contrary, Holder's expulsion came about solely because of his violation of that provision of Respondents' constitution requiring that members exhaust internal remedies prior to seeking court or agency relief. By merely filing an unfair labor practice charge, in violation of that rule, a member is not, *per se*, engaging in protected, concerted activity.

(3) Until the Board's 1964 decision in *Operating Engi-*

neers Union (Charles S. Skura), 148 NLRB 679, no case had held, and no one had suggested, that a union could violate Section 8(b)(1)(A) of the Act by expelling a member for violation of an internal union rule, where it does so without interfering with the member's status as an employee. It was in 1959, by means of Title I of the Labor-Management Reporting and Disclosure Act, 73 Stat. 522, 29 USC 411 et seq. (hereinafter referred to as the "Landrum-Griffin Act"), that Congress first turned its attention to the union-member relationship and first declared federal rights and remedies in respect thereof. Section 101(a)(4) of Title I of the Landrum-Griffin Act protects a member's "right to sue", viz., his right to institute court and Board actions against his union. Section 102 of Title I of the Act states that suits for infringement of Title I rights "shall be brought" in the U. S. district court for the district where the violation occurred. Accordingly, the only federal forum provided by law to redress the "wrong" of Holder's expulsion by the Respondents is a U. S. district court in an action brought under Title I of the Landrum-Griffin Act.

(4) Section 101(a)(4) of the Landrum-Griffin Act contains a proviso which states that union members "may be required to exhaust reasonable [intra-union] hearing procedures", for a period of time not to exceed four months, prior to instituting extra-union "proceedings against such organizations or any officer thereof". This provision of the Landrum-Griffin Act, as the Court below held, expressly sanctions that conduct of Respondents which the Board held was an unfair labor practice under Section 8(b)(1)(A) of the Act. But it can not be held that that which is expressly sanctioned by the Landrum-Griffin Act is an unfair labor practice under the Taft-Hartley Act, particularly in light of the legislative history of Section 8(b)(1)(A) and the proviso to that Section.

ARGUMENT.

Introductory.

Particularly because of the nature of the Board's brief, it is well to remember what this case does involve and what it does not involve. The narrow issue before the Court in this appeal is whether the Congress *in Section 8(b)(1)(A) of the Act* declared it to be an unfair labor practice for a union, without affecting the job rights of a member, to expel that member from membership for violating a union rule requiring that members exhaust internal union remedies prior to resorting to extra-union judicial *fora*. As Respondents view it, therefore, the legal issue involved in this case is relatively narrow. However, implicit in this issue is a somewhat broader question of administrative law and of jurisprudence generally. That question is this:

May the Board, in the guise of interpreting the Act, amend the Act so as to condemn as an unfair labor practice conduct which is not only not proscribed therein, but conduct which, all available evidence indicates, Congress specifically intended not to reach by Section 8(b)? In the first of the following sections, we shall demonstrate that, beyond any question, Congress never intended that conduct such as Holder's expulsion by Respondents in this case was to be considered an unfair labor practice.

I.

THE PLAIN MEANING AND CLEAR LEGISLATIVE HISTORY OF SECTION 8(b)(1)(A) OF THE ACT ESTABLISH THAT, SINCE HOLDER WAS EXPELLED FROM MEMBERSHIP IN RESPONDENTS FOR VIOLATION OF AN INTERNAL UNION RULE WITH RESPECT TO THE ACQUISITION OR RETENTION OF MEMBERSHIP IN RESPONDENTS, THE EXPULSION DID NOT VIOLATE THAT SECTION.

Section 7 of the Act preserves for employees the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Further, Section 7 also guarantees to employees the right, with limitations not relevant here, "to refrain from any or all of such activities." Section 8(b)(1)(A) of the Act declares it to be an unfair labor practice for a union "to restrain or coerce, (A) employees in the exercise of the rights guaranteed in Section 7", with the following proviso:

> "*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

The Board would have this Court hold Respondents guilty of a violation, as to Holder, of this Section.

At page 15 of its brief, the Board attempts to portray its theory of why in this case there was a violation of Section 8(b)(1)(A) as constituting no more than a traditional reading given to Section 8(b)(1)(A). But this is not true. Indeed, the extraordinary nature of what the Board attempted to do by its decision in this case is seen from the fact that that decision is the first in the history of the Na-

tional Labor Relations Act in which an order was entered by the Board directing a union to reinstate an expelled member. Indeed, it was not until the Board decided the case of *Operating Engineers Union (Charles S. Skura)*, 148 NLRB 679, on August 31, 1964—17 years after the enactment of Section 8(b)(1)(A) as part of the Taft-Hartley amendments—that anyone believed it conceivable that a union could violate the Act by expelling or otherwise disciplining a member, without in any way interfering with that member's status as an employee.[3] In *Skura*, the Board held that the union violated Section 8(b)(1)(A) when it fined an employee for filing unfair labor practice charges with the Board in violation of a rule requiring members to exhaust intra-union remedies prior to seeking extra-union relief. And the Board's decision in the instant case was based solely on its *Skura* reading of the Act.[4] But, as we shall now see, and as the Court below held, the construction given by the Board to Section 8(b)(1)(A) in *Skura* and in its few case progeny is violative of the plain language and clear legislative history of that Section.

The proviso to Section 8(b)(1)(A) states, in effect, that that Section cannot be violated by a labor organization when it prescribes and enforces internal rules governing the acquisition or retention of membership in the union. It is

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[3] On January 17, 1964—shortly before both the **Skura** decision and before Holder's expulsion on June 8, 1964—the Board decided the case of **Wisconsin Motor Corp.**, 145 NLRB 1097. The court below summarized **Wisconsin Motor** as follows: "... [T]he Board, after reviewing pertinent legislative history, had ruled that it had 'not been empowered by Congress to police a union decision, that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee.' 145 NLRB at 1104."

[4] The Board's decision does not cite **Skura.** Rather, its brief decision relies on **Van Camp Sea Food Co., Inc.**, 159 NLRB No. 47. But **Van Camp Sea Food Co.** is based solely on the **Skura** interpretation of §8(b)(1)(A).

submitted that that consideration alone establishes the correctness of the lower court's decision holding that Respondents had not violated Section 8(b)(1)(A). On the basis of the proviso, and of the "plain meaning" rule of statutory construction, the Board's decision in this case—as well as in all its *Skura* line of cases—was clearly erroneous, since the exhaustion of remedies requirements in Respondents' internal rules is obviously one "with respect to the acquisition or retention of membership" in Respondents.

Moreover, a truly overwhelming body of recorded legislative history discloses that the "plain meaning" of the language of the proviso to Section 8(b)(1)(A) accurately and completely expresses the "true meaning" intended by the draftsmen to be given not only to that proviso but also to the portion of the section preceding it. It is unnecessary for us in this brief to discuss at any great length this legislative history. This is because only last term this Court, in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), fully and completely assayed, in a context identical with that of the instant case, the legislative history of 8(b)(1)(A). In *Allis-Chalmers*, which we will discuss at greater length below, the union imposed fines upon some of its members for crossing its picket lines and working during an economic strike. Although the union there did not, just as the Respondents in this case did not, attempt to affect the job status of these employees, that union did institute, as to some of them, state court actions to compel payments of the fines. The employees filed charges under Section 8(b)(1)(A) and the Board, with this Court's subsequent approval, found that that Section had not been violated. Justice Brennan's opinion for this Court's majority in *Allis-Chalmers* is largely based on the consideration—which appears irrefutable to us—that in fining, and enforcing the fine against, a member for violating an intra-union rule, a union does not "restrain or coerce" that employee within

the meaning of Section 8(b)(1)(A), even aside from the exculpatory effect of the proviso in such a case. The chief basis for the Court's opinion is the legislative history to which we have referred above and which we need not repeat at any length here. That history, suffice it to say, establishes beyond the slightest possibility of doubt that, in enacting Section 8(b)(1)(A), all Congressmen, those for and against the Taft-Hartley amendments, intended that the Board should not interfere in any way with the internal affairs of labor unions. Although this Court is well aware of this legislative history, we can not refrain from noting here a small, but significant, item of it.

The proviso to Section 8(b)(1)(A) was introduced on the floor of the Senate by Senator Holland on April 30, 1947 (in the form of an amendment to an amendment offered by Senator Ball), for the purpose of putting to rest the strongly expressed fears by certain opponents of the Taft-Hartley amendments, that, by means of Section 8(b)(1)(A), limitations were being imposed on the rights of labor unions to conduct their own internal affairs. During discussion on the Holland amendment, one of these opponents, Senator Pepper, speaking for himself and Senator Morse, arose on the floor and questioned as follows:

> "Am I correct in assuming that it is the interpretation of the Senator from Ohio [Taft] and the Senator from Minnesota [Ball] that there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members, and that if the union wishes to discriminate in respect to membership there is no provision in the bill which denies it the privilege of doing so?" (93 Congressional Record 4400, Legislative History of the Labor Management Relations Act, Vol. II, p. 1142 (NLRB, 1948).)

Senator Ball's response to Senator Pepper's question is

an excellent summary of what the entire legislative history clearly discloses to have been the intent of the whole Senate. To Senator Pepper's question, Senator Ball responded as follows:

> "Absolutely not. If the union expels a member of the union *for any other reason* than nonpayment of dues, and there is a union-shop contract, the union cannot under that contract require the employer to discharge the man from his job. It can expel him from the union at any time it wishes to do so, *and for any reason.*" (93 Congressional Record 4400, Legislative History, Vol. II, p. 1142.) (Emphasis supplied.)

When this bit of legislative history is considered, together with the other items of that history discussed by this Court in *Allis-Chalmers*, it is obvious that the Board in this case did just what Senators Holland, Ball, Taft and others assured the opponents of the Taft-Hartley Act could never happen.

There is another significant item of legislative history which makes Respondents' position in this case as to the innocence of its conduct under Section 8(b)(1)(A) even stronger than that of the union in *Allis-Chalmers*. That item is as follows:

As finally enacted, the National Labor Relations Act of 1935 (the "Wagner Act") contained Section 8(a)(4), which makes it an unfair labor practice for an *employer* to discriminate against an employee for filing charges with the Board or for giving "testimony under this Act". Section 8(b), the Section which lists union unfair labor practices, and which was inserted into the Act as part of the 1947 amendments, contains no provision analogous to Section 8(a)(4)—a consideration which, in and of itself, goes a long way in establishing Respondents' innocence in this case. But what is particularly relevant in terms of legis-

lative history is the fact that, as it passed the House of Representatives, the Taft-Hartley Bill did contain a provision, a Section 8(c)(5), making it an unfair labor practice for a union to penalize members for instituting Board proceedings. (See Hartley Bill, H. R. 3020, 80th Cong., 1st Sess., *Legislative History, LMRDA*, Vol. I, p. 180.) However, this provision, which would have made it an unfair labor practice for a union to do what Respondents did here, was deleted from the Bill and the Act was passed without it. As the Court below stated (R. 37),

> "... it was not by inadvertence that Congress failed to include in the Taft-Hartley Act a general section explicitly protecting union members who filed charges against their unions from union reprisals."

It is noteworthy that, because there is no answer to the devastating effect of this portion of the legislative history on the Board's theory in this case, the Board offers none. What the Board does contend is, first, that this Court should be particularly attentive to the "overall plan" (Board's brief, p. 13) of the Congress, rather than to the actual language resulting from the legislative deliberations or to the legislative history indicating congressional intent. We welcome such an examination of this "overall plan" and shall direct our attention to it from page 19 to 23 below.

The Board also offers in support of its position as to legislative history, the view of the Court of Appeals for the District of Columbia, expressed in *Roberts v. NLRB*, 350 F. 2d 427, 428 (1967), that "the legislators *may* have decided it was unnecessary to make specific that it *might* be an unfair labor practice under Section 8(b)(1) to fine or discriminate against a member for filing a charge against the union" (emphasis supplied). But, this completely speculative remark by the Court in *Roberts* is rebutted not only by the *specific* legislative history adverted to above, but,

in addition, by this Court's authoritative gloss on this legislative history in the *Allis-Chalmers* opinion, which was decided subsequent to *Roberts*. There simply is no legislative history in support of the Board's position before this Court and, accordingly, the Board has been constrained to construct an interpretation of Section 8(b)(1)(A)—utterly baseless in our view—which we shall now discuss.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "restrain or coerce" employees in the exercise of Section 7 rights. The Board argues that, since Section 8(a)(1) is violated, in addition to Section 8(a)(4), when an employer discriminates against an employee for filing unfair labor practice charges with the Board, a union must be deemed to violate Section 8(b)(1)(A) when it disciplines a member for filing charges against it. There are several answers to this contention, any one of which demolishes this interpretation of Section 8(b)(1)(A).

The Board's contention in this regard, which is found at pp. 11 to 14 of its brief, proceeds on the basis of the premise (Board's brief, p. 13) that Congress intended in Section 8(b)(1)(A) of the Act to impose upon unions the same restriction upon engaging in restraint or coercion as is imposed upon employers by Section 8(a)(1). Again, this Court's decision in *Allis-Chalmers* supplies the answer to this theory. At pages 190-191 of the majority opinion in *Allis-Chalmers*, Justice Brennan spoke as follows:

> "It is true that there are references in the Senate debate on Section 8(b)(1)(A) to an intent to impose the same prohibitions on unions that applied to employers as regards restraint and coercion of employees in their exercise of Section 7 rights. However apposite this parallel might be when applied to organizational tactics, it clearly is inapplicable to the relationship of a union member to his own union."

Even aside from the foregoing, the Board's contention as to the correlative nature of Sections 8(a)(1) and 8(b)(1)(A) ignores the fact that Section 8(b)(1)(A) has a proviso which immunizes from Board proscription internal rules of unions relating to the terms upon which members acquire and retain union membership. No analogue to this, of course, appears in Section 8(a)(1).

Moreover, the Board's theory in this regard is further rebutted by the fact that Congress specifically rejected the provision—Section 8(c)(5) of the Taft-Hartley Bill—which would have imposed upon unions an analogous duty not to commit that conduct by which an employer violates Section 8(a)(4) of the Act. Obviously, the specific rejection by Congress of an analogue to Section 8(a)(4) in Section 8(b) is entitled to more weight than an argument as to what Congress *may* have intended by the general language of Section 8(b)(1)(A)—even aside from the proviso and the legislative history.

The Board cites several cases in support of its theory of the interpretation to be given to Section 8(b)(1)(A). None of these cases, found at footnote 8 of the Board's brief, are on point. They are cases in which employers were held to have violated Section 8(a)(1) by threatening or penalizing, in various ways, employees who had invoked the Board's processes. From all that we have said above, it is obvious that these cases do not aid in answering the question of whether a *union* commits a violation of Section 8(b)(1)(A) when *it* disciplines a member for filing charges in violation of internal union rules.

Moreover, the facts of each of the cited cases demonstrate that, in light of those facts, the employer conduct at issue did in fact restrain employees in the exercise of Section 7 rights. These cases, therefore, may not be read to establish a *per se* rule that every Section 8(a)(4) violation by an employer necessarily entails a violation of Sec-

tion 8(a)(1). And the Board indirectly admits this. At page 12 of its brief, the Board states that "it has long been recognized that an employer's interference with an employee's resort to Board processes [a violation of Section 8(a)(4)] *may* also constitute a violation of" Section 8(a)(1). But all of the cases—and the only cases—cited by the Board were cases in which the employer's conduct clearly interfered with the employees' right under Section 7 to engage in concerted action—and was therefore directly and independently a violation of Section 8(a)(1)—as well as a punitive act forbidden by Section 8(a)(4). In this case, to the contrary (and still assuming *arguendo*, that some sort of equation can be posited between Sections 8(a)(1) and 8(b)(1)(A)), nothing in the record supports a finding that either Holder or any other member of the union was restrained or coerced from engaging in any type of concerted activity protected by Section 7 of the Act.

In sum, the Board cannot face up to the plain meaning and clear legislative history of Section 8(b)(1)(A). Accordingly, the Board eschews such considerations and proceeds on the basis of an utterly erroneous analysis of Section 8(b)(1)(A). Since the text and legislative history of Section 8(b)(1)(A) establish the innocence of Respondents' conduct as to Holder, the decision of the Court below should be affirmed.

II.

SINCE HOLDER'S EXPULSION FROM RESPONDENTS WAS NOT THE RESULT OF HIS ENGAGING IN ANY ACTIVITY PROTECTED BY SECTION 7 OF THE ACT, RESPONDENTS DID NOT VIOLATE SECTION 8(b)(1)(A).

The issue of whether Holder's filing of his previous charge was protected activity under Section 7 is one sug-

gested by the opinion of the court below in this case. It is an issue, however, which we do not deem to be particularly relevant to the questions presented herein. This is because we deem it obvious that Respondents' conduct, particularly because of the proviso to Section 8(b)(1)(A), must be deemed innocent in any event, that is, innocent even if it be assumed (i) that Holder's act of filing the previous charge was an activity protected by Section 7 of the Act, and (ii) that his expulsion constituted "restraint or coercion". Justice White, at pages 197-198 of his concurring opinion in *Allis-Chalmers*, addressed himself to this issue as follows:

> "... [A] union may expel to enforce its own internal rules, even though a particular rule limits the Section 7 rights of its members and even though expulsion to enforce it would be a clear and serious brand of 'coercion' imposed in derogation of those Section 7 rights. Such restraint and coercion Congress permitted by adding the proviso to Section 8(b)(1)(A)."

Since the opinion of the court below also held that "the proviso protects the Union's action in this case" (R. 38), we do not think it was necessary for that court to raise the issue of whether Holder's filing of his previous charge was protected activity in the context of this case. However, the court raised this question by also pronouncing a dictum to the effect that a union might violate Section 8(b)(1)(A) by disciplining a member who files charges asserting a violation by the union of his Section 7 rights.[5]

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[5] It must be noted that neither the Board's General Counsel nor the Board attempted to bring this case within this dictum of the court below. The General Counsel did not even attempt to prove—and the record is devoid of any facts showing—that Holder's previous charge was based on an allegation that the Respondents had interfered with any concerted activity on his part. To the contrary, the General Counsel proceeded solely on the **Skura** theory, namely,

The court below disposed of this question by finding authorization for Respondents' expulsion of Holder in the proviso of Section 101(a)(4) of the Landrum-Griffin Act. At pages 29 and 34 below, we shall demonstrate that this conclusion of the lower court was correct.

It is our position, however that even if there were no such proviso in Section 101(a)(4) of the Landrum-Griffin Act and even if the proviso in Section 8(b)(1)(A) of the Taft-Hartley Act did not exist, the Board's decision in this case, nevertheless, would have been erroneous. This is because it cannot be concluded that by the mere filing of an unfair labor practice charge an employee engages in an activity protected by Section 7 of the Taft-Hartley Act.

In the first place, Section 7 protects only "*concerted* activities for the purpose of collective bargaining or other mutual aid or protection". It is self-evident that the act of filing a charge, when taken by any individual solely on his own behalf, may not be deemed, in and of itself, to be a concerted activity protected by Section 7.

It is true that the act of filing an unfair labor practice charge may be an item of conduct which is taken as part of, or in furtherance of what could properly be called concerted activity—and therefore may itself be protected by Section 7. For examples of this, the Court may refer to the cases cited at footnote 8 of the Board's brief. But in those cases the General Counsel proved that the filing of

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that the expulsion of Holder for filing of charges with the Board—irrespective of the content of those charges—without first exhausting internal union remedies was, in and of itself, a violation of Section 8(b)(1)(A). Because of this position of the General Counsel, there was no hearing before a Trial Examiner in this case and the case was decided by the Board on the pleadings.

charges was in furtherance of other activity that was concerted. In the instant case, the General Counsel did not even attempt such proof.

Further, it would be totally unrealistic to hold that the filing of a charge must, *per se*, constitute concerted activity. This is because experience confirms that persons may and do file all sorts of unfounded charges with the Board, complaining of all sorts of employer and union conduct with which the Act is totally unconcerned. For instance, if a union member files an unfair labor practice charge against his union protesting that the union disciplined him for violating a union rule by smoking at a union meeting, would anyone believe that the filing of such a charge is conduct protected by Section 7? And yet, the General Counsel's theory of this case was not qualitatively different from the theory subsumed in this hypothetical case. In this case too, the General Counsel, with subsequent Board approval, was satisfied with a state of the pleadings in which the filing of charges, in and of itself, because of the *Skura* rule, was cited as protected activity. The General Counsel was totally unconcerned with developing a record on the question of what conduct by Respondents Holder complained of in his previous charge.

To the extent that there is "evidence" on this score in the record, it of course demonstrates that Holder was not disciplined for engaging in "protected activity". To the contrary, after careful investigation and consideration, the Regional Director for the Board's Second Region advised Holder that the evidence "does not tend to establish that the Union violated the Act by" any action ascribed to it in the previous charge and that, therefore, the Regional Director was "refusing to issue [a] complaint in this matter" (R. 31).

It is obvious from the foregoing that by merely filing charges with the Board Holder was not engaging in activity

protected by Section 7 of the Act and, in any event, that the record in this case demonstrates that Holder was not engaging in such protected activity by filing the previous charge. Accordingly, even aside from the provisos to Section 8(b)(1)(A) of the Act and Section 101(a)(4) of the Landrum-Griffin Act, in expelling Holder, the Respondents did not interfere with any of his Section 7 rights and therefore committed no violation of Section 8(b)(1)(A).

III.

THE FORUM PROVIDED BY LAW TO REDRESS ANY "WRONG" COMMITTED BY RESPONDENTS AS TO HOLDER IS A UNITED STATES DISTRICT COURT IN AN ACTION BROUGHT UNDER TITLE I OF THE LANDRUM-GRIFFIN ACT.

As we have noted above, the legislative history of Section 8(b)(1)(A) refutes completely the Board's holding that there was a violation of that Section in this case. Accordingly, the Board, in effect, asks this Court to ignore that legislative history and to focus, rather, on the "overall plan" of the Congress in "drafting labor legislation" (Board's brief, page 13). It is obvious that this Court should not simply ignore the legislative history to which we have adverted above, any more than it ignored that legislative history in the *Allis-Chalmers* case. However, we welcome, along with the Board, full consideration by this Court of the "overall plan" of labor legislation in relation to the instant context. That plan, to the extent it may presently be gleaned, supports only the conclusion that in this case Respondents have committed no unfair labor practice as to Holder, as we shall now demonstrate.

As we have seen, Holder's charge before the Board contained his complaint that he was expelled by Respondents

because he sought judicial relief outside the established intra-union *fora*, without first exhausting internal remedies. Thus, complained Holder, with the Board's subsequent agreement, Respondents interfered with his "right to sue" by enforcing as to him the rule requiring members of Respondents to exhaust internal remedies prior to seeking extra-union relief.

The "overall plan" of this nation's labor legislation shows that in the Act Congress did not intend to interfere with a union's right to discipline its members for any reason, so long as that union did not attempt to condition a member's *employment* on good standing membership (see §8(b)(2) of the Act). It was in 1959—again following the "overall plan" of the Congress—that the Congress turned to the question of the rights of union members to be free, *as members*, from certain types of union conduct. Particularly relevant to this case is §101(a)(4) of the Landrum-Griffin Act, which protects for union members, *qua* members, the "right . . . to institute an action in any court, *or in a proceeding before any administrative agency* . . ." It is perfectly plain that in the instant case, Holder's unfair labor practice charge alleged no more than interference by Respondents with his "right to sue"—a right made federally cognizable by §101(a)(4) of the Landrum-Griffin Act.

Section 101(a)(4) of the Landrum-Griffin Act is found in Title I of that act. Title I also contains a §102 which states that cases in which union members complain of violations of Title I "*shall* be brought in the district court of the United States for the district where the alleged violation occurred."[6]

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[6] Section 103 of the Landrum-Griffin Act, which is also found in Title I, states that nothing in the preceding portion of Title I shall "limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal . . .". By this provision Congress was obviously not preserving for union members any right, founded on Section 8(b)(1)(A)

This §102 means, of course, that a forum has been established by Congress as the proper one in which union members may complain, as did Holder, that their union has abridged "their right . . . to institute an action . . . in a proceeding before any administrative agency . . .". That forum is simply not the Board. And the proviso to §8(b)(1)(A) of the Act is evidence enough that Congress did not intend to have the Board concern itself with purely intra-union matters. Thus, the "overall plan"[7] of the Congress, to which alone the Board would invite the attention of this Court, destroys the Board's theory of a violation of §8(b)(1)(A) in this case just as certainly as the specific legislative history of that section cited herein and largely relied upon by this Court last term in its *Allis-Chalmers* opinion.

Once again, all we have said in this section of our Argument has been apprehended by this Court in the *Allis-Chalmers* opinion. As to the "overall plan" of federal labor legislation and the relationship between the Taft-Hartley and Landrum-Griffin Acts, Justice Brennan spoke as follows at pages 193-194 of his opinion:

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of the Act, to be free of discipline by his union for violating a union rule requiring exhaustion of remedies, where that discipline was not coupled with interference with the member's status as an employee. This is obvious because it was not until the **Skura** decision, which was handed down in **1964**, that anyone supposed that Section 8(b)(1)(A) could cover such a situation, and certainly Congress in 1959 was not, in Section 103 of the Landrum-Griffin Act, preserving for members "rights" which did not exist until 1964.

[7] A case exemplifying this "overall plan" is **McCraw v. United Association**, 341 F. 2d 705 (6th Cir., 1965). Although the Court decided many issues in that case which are not relevant to this appeal, what is significant is that the action was brought by a union member to complain that his rights under Section 101(a)(4) of the Landrum-Griffin Act were violated by a union fine imposed upon him for filing charges with the Board without exhausting intra-union remedies. The Court found a violation of Section 101(a)(4). What is interesting about this case is that it serves to illustrate that a district court in an action brought under Title I of the Landrum-Griffin Act is the proper forum to which to bring complaints against a union of the nature Holder brought in the instant case.

"The 1959 Landrum-Griffin amendments, thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs, also negate the reach given Section 8(b)(1)(A) by the majority *en banc* below. 'To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. The Court may properly take into account the latter Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might pemit.' *Labor Board v. Drivers' Local Union*, 362 U. S. 274, 291-292. In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union members subjected to discipline."

The *Drivers' Local Union* case, cited by the Court in the above quotation, is noteworthy because it was the last previous effort by the Board, prior to its *Skura* line of cases, to find in the general language of Section 8(b)(1)(A) unfair labor practices not set forth in the subsequent subsections of Section 8(b) and not covered by the language of Section 8(b)(1)(A). Prior to correction by this Court in *Drivers' Local Union*, the Board had held in numerous cases that so-called "recognitional picketing" by a union violates Section 8(b)(1)(A). But this Court reversed the Board and one of the grounds for this reversal was that Congress's enactment (by the Landrum-Griffin Act) of Section 8(b)(7), which particularly addressed itself to the problem of recognitional picketing, evidenced a Congressional intention not to proscribe such picketing by the general language of Section 8(b)(1)(A). The analogy here is perfect, just as it was in *Allis-Chalmers*. Had Congress believed that Section

8(b)(1)(A) prohibited what the Respondents did to Holder, in this case, there would have been no reason to enact Section 101(a)(4) of the Landrum-Griffin Act. Accordingly, under the reasoning of this Court in *Drivers' Local Union*, as applied by this Court in *Allis-Chalmers*, and as all of this correctly and authoritatively apprehends the "overall plan" of the Congress, it cannot be held that Section 8(b)(1)(A) governs the Respondents' conduct at issue here and makes that conduct an unfair labor practice. Accordingly, the decision of the court below should be affirmed.

IV.

CASE AUTHORITY SUPPORTS THE DECISION OF THE COURT BELOW.

The most authoritative court pronouncement on the issues raised in this proceeding is this Court's *Allis-Chalmers* gloss on Section 8(b)(1)(A). The particularly significant aspect of *Allis-Chalmers*, vis-a-vis the instant case, is that the union conduct there at issue came much closer to a Section 8(b)(1)(A) violation than Respondents' conduct in this case. It will be recalled that *Allis-Chalmers* involved union fines against members, and attempted court enforcement thereof, for crossing and working behind picket lines during an economic strike. Obviously, by choosing not to respect picket lines, the disciplined members in the *Allis-Chalmers* case were choosing to refrain from concerted activity. Refraining from concerted activity is conduct *expressly protected* by section 7 of the Act. In this case, however, Holder engaged in nothing that could be called "protected activity" within the meaning of Section 7. Accordingly, on its facts, this case is much more compelling for a conclusion of non-violation of Section 8(b)(1)(A) than was *Allis-Chalmers*.

The three opinions in *Allis-Chalmers* also indicate that all nine justices of this Court must, if they choose to follow their reasoning in that case, find the Respondents innocent and affirm the Court below in this case.

The majority opinion in *Allis-Chalmers* holds that a union's imposition of a fine upon its members without affecting their status as employees is simply not the type of "restraint or coercion" that Section 8(b)(1)(A) intended to reach and therefore ". . . the fines themselves and *expulsion for non-payment would not be* an unfair labor practice." (*Allis-Chalmers*, p. 192.)

Moreover, the dissenting justices in *Allis-Chalmers* also clearly indicated in their opinion, written by Justice Black, that mere expulsion of a member cannot constitute in any case a violation of Section 8(b)(1)(A). Justice Black's difference with the majority in *Allis-Chalmers* clearly proceeds on the premise that the union in that case went beyond the area of privileged internal affairs by seeking "effective outside assistance to enforce the payment of its fines" (p. 206). The following remark of Justice Black, however, indicates that which is made manifest in his opinion, namely, that a union is not guilty of restraint or coercion prohibited by Section 8(b)(1)(A) when, without seeking extra-union help, it disciplines a member:

> "Just because a union might be free, under the proviso, to expel a member for crossing a picket line does not mean that Congress left unions free to threaten their members with fines" (page 203).

From the foregoing, it would appear that eight justices in the *Allis-Chalmers* case would find the Respondents innocent of prohibited restraint or coercion in this case.[8]

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[8] At page 16 of its brief the Board explains its theory of "restraint or coercion" by stating that mere expulsion would have such effect, "since it entails the loss of union strike funds, pension and insurance benefits". Here, the Board again reaches beyond the record for

And, as we have seen at page 16 above, Justice White's concurring opinion in *Allis-Chalmers* also contains reasoning which would require that the court below be sustained in the instant case. That opinion appears to assume that the expulsion of a member by a union might limit the member's Section 7 rights. But, Justice White concludes, "Such restraint and coercion Congress permitted by adding the proviso to Section 8(b)(1)(A)." (*Allis-Chalmers*, p. 198.)

Of course, this Court's decision in *Allis-Chalmers* is not the only case in which Section 8(b)(1)(A) was interpreted as this Court did in that case. Just the other day, the Court of Appeals for the Seventh Circuit decided *Scofield v. NLRB*, 57 Labor Cases ¶12,531, 1968. In this decision, which affirmed the Board's decision in *Wisconsin Motors Corp.*, 145 NLRB 1097 (1964), the Court concluded that ". . . internal union disciplines are not among the proscribed restraints" intended to be reached by Section 8(b)(1)(A). In *Scofield*, Chief Judge Cummings cites many other court decisions also reaching this correct conclusion.

Confronted by this case authority, the Board is compelled to rely almost solely on its own recent *Skura* line of cases (and on approval of their reasoning by the Court of Appeals for the District of Columbia in *Roberts v. NLRB*, 353 F. 2d 427, 1965), as authority for its position in this case. These decisions, of course, suffer from all of the defects discussed above. Moreover, so defective is the Board's reasoning in *Skura* that the Solicitor General does not attempt to defend this case on that reasoning. The basis of the decision that an unfair labor practice had been committed in the *Skura*

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some support for its case. The record simply does not contain any evidence that Holder suffered any such losses by reason of his expulsion. In addition, the record indicates to the contrary that, in point of fact, Holder suffered no restraint or coercion, since he regarded union membership so lightly as to feel free to ignore the constitutional provisions requiring all members to exhaust intra-union remedies prior to seeking court or administrative relief.

case was that Section 10 of the Act gave the Board an "implied power" to keep access to the Board open—an implied power which could be enforced by means of finding a union guilty of an unfair labor practice under Section 8(b)(1)(A). This bizarre reading of the Act—which entails the finding of unfair labor practices in places other than Section 8—is completely abandoned by the Solicitor General in his brief. As we have seen, the Board seeks to have this Court find that Respondents had committed an unfair labor practice largely on the basis of its interpretation of Section 8(b)(1)(A). But the Board decision in this case was based solely on the reasoning contained in *Skura*, as further developed by the Board in *Van Camp Sea Food Co., Inc.*, 159 NLRB No. 47 (1967) (R. 24). This Court will, of course, judge the propriety of the Board's decision in this case solely on the basis of the reasoning offered by the Board for that decision and not on the basis of a different reason offered for the first time in this Court. This is because, as this Court said in *S. E. C. v. Cherney Corp., et al.*, 332 U. S. 194, at p. 196, it is a "fundamental rule of administrative law" that

> ". . . the reviewing court in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by such agency. If those grounds are inadequate or improper, the Court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

In *NLRB v. Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965), Justice Goldberg stated for this Court that,

> ". . . [T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalization for agency action' . . . [since]

> . . . for reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the ordinary function of the process of judicial review".

We believe, despite the seeming effect of the foregoing authorities, that it is unnecessary for this Court to remand this case to the Board for the purpose of reexamining the theoretical basis of the *Skura* rule. This is because there is simply no reasoning by which the rule of that case can be sustained. We cite present counsel's refusal to defend *Skura* on the Board's own terms as further evidence of the frailty of that decision.

Perhaps the greatest error which the Board's *Skura* decision manifests is one to which we have not yet adverted. That error—perhaps we should say evil—is that in *Skura,* and in subsequent cases, the Board has attempted to arrogate to itself the power to decide which items of a union's conduct as to its purely internal affairs are "legitimate" and which are not. Thus, the Board has decided that it is all right for a union to discipline a member for crossing a picket line (*Allis-Chalmers*), or for filing a decertification petition *(Price v. NLRB,* 373 F. 2d 443, 9th Cir., 1967, pending on petition for certiorari, No. 339, this term). See also *Tawas Products,* 151 NLRB 46 (1965). But the Board has also decided that it is somehow not proper, and against public policy, for a union to enforce against a member a rule requiring exhaustion of internal remedies. What is the source of this power? It certainly is not specified anywhere in the Act. To the contrary, the proviso to Section 8(b)(1)(A) puts beyond the ken of Board concern the purely internal affairs of labor unions. And yet, in a whole line of cases the Board is now attempting to determine for unions what internal rules as to membership terms they may and may not make. The Board clearly has no statutory power to do this.

The brief submitted by the Board to this Court well illustrates the Board's attempt by means of the *Skura* line of cases to usurp for itself the power to adjudge the legality of intra-union rules. At page 18 of the Board's brief we find this caption: "B. Union discipline for filing charges with the Board without first exhausting internal union procedures is not privileged as an internal union matter beyond the scope of Section 8(b)(1)(A)". But in the portion of the brief following that caption (pp. 18-27), the Board not once explains why a rule requiring the exhaustion of internal union remedies is not "an internal union matter beyond the scope of Section 8(b)(1)(A)". To the contrary, the Board devotes all of this portion of its brief to emphasizing that such a union rule is "beyond the area of *legitimate* internal union affairs" (brief, p. 20). But because the Board deems this rule requiring exhaustion to be "illegitimate", it does not follow that such rule is other than an internal union rule. And, in any event, as we have seen, the Board has no statutory power to decide which internal union rule is legitimate and which is not. Accordingly, it is submitted that *Skura* and the other cases following its rule should not be looked to by this Court as a reasoned and proper interpretation of Section 8(b)(1)(A) of the Act.

One case relied upon by the Board is this Court's decision in *Nash v. Florida Industrial Commission*, 389 U. S. 235 (1967). But the *Nash* case obviously has nothing to do with Section 8(b)(1)(A) of the Act. In *Nash*, this Court decided that refusal by a *state* to pay unemployment insurance to workmen solely because they have filed charges with the Board constitutes state action violative of the supremacy clause of the United States Constitution. Assuredly, however, the Board has no power to enforce the supremacy clause. Assuming the existence of a federal policy to preserve free access to the Board, it certainly does not follow that a union's interference with that free

access constitutes an unfair labor practice.[9] When it is remembered that the sole issue in this case is whether Respondents committed the unfair labor practice defined in Section 8(b)(1)(A), it becomes more than obvious that this Court's *Nash* decision lends no support to the Board's position in this case.[10]

V.

SECTION 101(a)(4) OF THE LANDRUM-GRIFFIN ACT REQUIRES THAT THE DECISION OF THE COURT BELOW BE AFFIRMED.

Section 101(a)(4) of the Landrum-Griffin Act provides that,

> "No labor organization shall limit the right of any member thereof to institute an action in any Court, or . . . before any administrative agency . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization . . ."

---

[9] Of course, what the Respondents did here did not deny to Holder free access to the Board. To the extent that Respondents' rule requiring exhaustion of internal remedies affected Holder's access to the Board's processes, it did not **prevent** him from using those processes, or penalize him from doing so, but merely delayed the date at which he could invoke them.

[10] At footnote 12 of its brief (page 15), the Board cites four additional cases which, it is contended, support the construction that the Board would have this Court give to Section 8(b)(1)(A). But those cases are transparently distinguishable on their facts from the instant case. Each involved interference with activity clearly protected by Section 7 by means of threats of physical violence as well as, in three of the cases, threats of loss of employment. What we have said in the preceding portions of this brief obviates the need for further explanation of why these authorities do not aid the Board in this case.

The Court below held that the effect of that Section is to make "it mandatory that the *Skura* rule be rejected and the Board's action in this case be set aside" (R. 39). As we shall now show, this conclusion of the court was correct. Obviously, it would make no sense to hold that conduct expressly sanctioned by Section 101(a)(4) of the Landrum-Griffin Act constitutes an unfair labor practice. However, it is submitted that this reasoning is not necessary to a rejection of the *Skura* rule by this Court and a consequent affirmance of the Court of Appeals' decision. Put differently, even should this Court hold that the court below was incorrect in its interpretation of Section 101(a)(4) it still would not follow that the Respondents' conduct in this case, even though not authorized or sanctioned by Section 101(a)(4) of the Landrum-Griffin Act, constitutes an unfair labor practice under Section 8(b)(1)(A) of the Taft-Hartley Act. We shall, nevertheless, show that the court below was correct in deciding that Respondents' conduct was lawful under the proviso to Section 101(a)(4) of the Landrum-Griffin Act.

The proviso to Section 101(a)(4) states that any member, "may be required" for a four month period of time to exhaust intra-union remedies prior to seeking extra-union relief. The Board argues here that it is not a union but only a court which may enforce a union rule requiring exhaustion of intra-union remedies. This interpretation of the proviso to Section 101(a)(4) is clearly unwarranted. We cannot improve on the explanation by the Court below of why it must be held that, under the proviso, it is a union and not a court which is authorized to require exhaustion of internal remedies. The lower court said in this regard:

> "To avoid the impact of this proviso, the Board argues that the proviso does not say who may require the union member to exhaust internal hearing procedures

and then reaches the surprising conclusion that it is the Board, rather than any labor organization, that is authorized by Congress to require that a union member resort to reasonable intra-union procedures. We think this construction does violence to the structure and the sense of section 101. That section is entitled, 'Bill of rights; constitution and by-laws of labor organizations'. It consists of a number of provisions prescribing what unions may and may not do and require in the conduct of their affairs and in the treatment of their members. The general prohibition in the subsection here in question is expressly directed against labor organizations. Logically, and in normal reading, the attendant and qualifying proviso is an exception stating what such an organization may do despite the preceding general restriction upon its action. Moreover, there is no need for a proviso to authorize a court or an administrative body to postpone its action until a litigant shall exhaust intra-union remedies, since judicial and quasi-judicial bodies frequently exercise such discretionary power to postpone their own action pending the exhaustion of other remedies as a matter of inherent right without benefit of legislation" (R. 39-40).

The Board does not even attempt to rebut the foregoing. Rather, it engages in an examination of the legislative history of Section 101(a)(4) and attempts to extrapolate from that history some support in the debates and reports for the conclusion that it is courts and not unions which may require members to exhaust internal remedies under the proviso of Section 101(a)(4). It is clear, however, contrary to the Board's discussion of the legislative history of Section 101(a)(4), that the only items of that history which directly relate to the point of whether courts or unions may require members to exhaust internal remedies under the

proviso support the construction given to the proviso by the court below, namely, that it is unions which are authorized to require members to exhaust intra-union remedies. Senator Goldwater, in his remarks concerning the Kennedy-Irvin Bill (S. 1555), which passed the Senate on April 25, 1959, made the following statement concerning the "Protection of the Right to Sue" provision found in that bill—a bill which, aside from specifying a six-month period "during which members may be required to exhaust reasonable hearing procedures", differed in no substantial respect from what ultimately became Section 101(a)(4) of the Landrum-Griffin Act:

> "The draftsmanship of this provision is an open invitation *to unions* to discipline and penalize their members for using the processes of the NLRB against unions which have committed unfair labor practices against any of their members" (emphasis supplied; 105 Congressional Record 9108, *Legislative History, LMRDA*, 1959, p. 1280).

The only other item of legislative history which, to our knowledge, is directly on point in this regard also supports the conclusion of the court below rather than the conclusion the Board would have this Court reach. Interestingly, this item of legislative history is found at p. 36 of the Board's brief and is weighty indeed, since it is from the statement of Senator John F. Kennedy in which he reported back to the Senate the results of the work of the conference committee that fashioned the compromise that became Title I of the Landrum-Griffin Act. Senator Kennedy said,

> "On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws."

(105 Congressional Record 16414, *Legislative History, LMRDA*, 1959, p. 1432.)

In the course of these same remarks, Senator Kennedy then spoke directly to the point at issue:

> "The four-month limitation in the House Bill also related to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies." (105 Congressional Record 16414, *Legislative History, LMRDA*, 1959, p. 1432.)

The Board dismisses these last remarks by first calling them "cryptic" and then engaging in some speculation as to what Senator Kennedy "might" have meant by them (Board's brief, p. 36, f.n. 34). There appears to us simply no reason for not believing that Senator Kennedy meant exactly what he said and that, under the proviso of Section 101(a)(4), *unions* are authorized to require members to exhaust intra-union remedies.

Aside from the remarks of Senators Goldwater and Kennedy to which we have adverted, we must concede that there is a dearth of legislative history on this precise question. However, as the Board's brief well demonstrates, it is plain that the Congress wished not to disturb the doctrine of exhaustion of internal remedies as that doctrine had developed in the state and federal courts.[11] But in its brief the Board first states the legislative history establishing this Congressional purpose and then attempts to explain it away by contending that the doctrine of exhaustion of internal remedies, as it has developed in the courts, is no more than a rule of judicial discretion to be applied by the judiciary on a case by case basis. But this simply is not so. Indeed, the prime rationale normally given by courts for the ex-

[11] For the items of legislative history supporting this conclusion, see pp. 32, 35-37 of the Board's brief.

haustion of remedies doctrine is that the constitution and by-laws of a union constitute a binding contract between the union and each member and that, therefore, the union has a *contract right* to require exhaustion of internal remedies by members as a precondition to their obtaining extra-union judicial relief. *Snay v. Lovely,* 276 Mass. 159, 176 N. E. 791 (1931); *Polen v. Kaplan,* 257 N. Y. 277, 177 N. E. 833 (1931); *Bush v. International Alliance,* 55 Cal. App. 2d 357, 130 Pac. 2d 788; *Williams v. Masters, Mates & Pilots,* 384 Pa. 413, 120 A. 2d 896 (1956). See also, *Dragwa v. Federal Labor Union,* 136 N. J. Eq. 172, 41 A. 2d 32 (1945). And, of course, if a union has a contract right to require exhaustion of internal remedies, it certainly may not be held that judicial protection of that right is a mere rule of judicial administration.

It is also significant that fulfillment of the requirement of exhaustion of internal remedies is deemed by many authorities as so basic as to constitute a precondition to a court's having subject matter jurisdiction. *Falsetti v. Mine Workers,* 400 Pa. 145 (1960); *Wax v. Mailers' Union,* 400 Pa. 173 (1960); *Knox v. UAW, Local 90,* 361 Mich. 257, 104 N. W. 2d 743 (1960); *Kopke v. Ranney,* 16 Wis. 2d 369, 114 N. W. 2d 485 (1962); see also 87 ALR 2d 1082, at 1107-1108. Here, again, the holding in the foregoing cases makes unsupportable the theory that the doctrine of exhaustion of intra-union remedies is merely a rule of judicial discretion.

From all of the foregoing, it must be concluded (although we believe that the Court need not decide this issue in this case) that, under the proviso to Section 101(a)(4) of the Landrum-Griffin Act, it is a union, and not a court, that may require a member to exhaust internal union remedies and that, therefore, it may not be held that Respondents were guilty of an unfair labor practice for engaging in conduct sanctioned by the Landrum-Griffin Act.

CONCLUSION.

For all of the foregoing reasons, Respondents respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

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April 15, 1968.

NO. 796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INDUSTRIAL UNION OF MARINE
AND SHIPBUILDING WORKERS OF AMERICA,
AFL-CIO, AND ITS LOCAL 22

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of the respondent is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 129 national and international labor unions having a total membership of approximately 14,000,000, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinions below, jurisdiction, questions presented and the statutory provisions involved are set out at pp. 1-2, 39-42 of the National Labor Relations Board's Brief.

SUMMARY OF ARGUMENT

By its terms, Section 8(b)(1)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) requires a showing: first, that the conduct of the respondent union is directed toward a particular end, i.e. that it affects the exercise of a Section 7 right; and second, that this conduct constitutes a prohibited means of attaining that end, i.e. that it constitutes restraint or coercion as those terms were used by Congress. As this Court has stated, "the policy of the Act is to insulate employees' jobs from their organizational rights," *Radio Officers Union* v. *National Labor Relations Board,* 347 U.S. 17, 40 (1954). The Act, however, does not so insulate union membership as well. For Congress did not intend to denominate union disciplinary actions, such as expulsions or suspensions, which affect membership rights and not job rights, as restraint or coercion under the Act. Section 8(b)(1)(A) was enacted in 1947 and the decisions of this Court during the entire period subsequent to that date have been consistent with our view, *see Machinists* v. *Gonzales,* 356 U.S. 617, 620 (1958); *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.,* 388 U.S. 175 (1967).

The legislative history of Section 8(b)(1)(A) of the Act provides firm support for the position we urge. As Senator Ball, the sponsor of the provision which became Section 8(b)(1)(A), stated "it [a union] can expel him [a member] from the union at any time it wishes to do so and for any reason," 93 Daily Cong. Rec. 4400-4401 (April 30, 1947), 2 Legislative History of the Labor Management Relations Act of 1947 (G.P.O. 1948) 1131-1142. Indeed, when Congress did move to protect membership rights in 1959, it gave enforcement powers to the courts and the Secretary of Labor and not to the Board.

The essence of the Board's rationale for its holding that a union may not expel a member for failing to exhaust internal remedies for four months before filing a charge without violating Section 8(b)(1)(A) is that an expulsion or a fine, though not normally restraint or coercion within the meaning of the Act, may become illegal conduct under that Section if the end sought runs counter to public policy. The Board thus takes the position that, depending on the end sought, an otherwise legal means may become an unlawful means. The effect of this "logic" is to make it illegal for a union to do anything at all, no matter how innocent, if its aim is to have a member follow internal procedures before filing a charge. This result is patently unwarranted and impermissible. This Court's decision in *National Labor Relations Board* v. *Teamsters, Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960) so holds. For there, this Court rebuffed the Board's attempt to use Section 8(b)(1)(A) to interdict peaceful picketing because that picketing had an ultimate object—to force recognition—which the Board believed to be against public policy. In reaching its conclusion, the Court emphasized (362 U.S. at 282, 290) that Section 8(b)(1)(A) gives the Board the limited authority to require the cessation of certain types of union conduct, principally violence, and that it does not empower the Board to prohibit the use of otherwise lawful means because of the end sought.

Even if the foregoing argument were to be rejected and this Court were to hold that the Board could interdict union expulsions which were against public policy, that holding would not justify the Board's decision here. As the court below properly recognized, the public policy of the United States on the issue presented in the instant case is set out in Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411(a)(4)." That provision permits unions to discipline members who go to the Board without exhausting internal remedies for four

months. This is plainly the most logical conclusion to be drawn from the bare language and structure of Section 101(a)(4). It is also the most logical conclusion to be drawn from its legislative history. Originally, Section 101(a)(4) required exhaustion of internal remedies for six months. The six-month period of exhaustion was reduced to four months because both Senator Goldwater and Representative Griffin criticized the six-month time limit on the specific ground that while the union rules it allowed, if observed, would only delay access to the courts, it would enable a union, in effect, to bar a member from filing charges with the Board. The latter consequence flows from the fact that the Act's statute of limitations is six months. The Board has never applied an exhaustion of remedies rule and Congress was aware of this. In light of this demonstrated irrelevance of Section 101(a)(4) to the capacity of the Board to process charges, the great concern manifested about reducing the allowable exhaustion period from six months to four months is utterly inexplicable unless Congress intended to allow unions to discipline members who fail to exhaust their internal remedies.

ARGUMENT

EXPULSIONS AND OTHER NONVIOLENT FORMS OF UNION DISCIPLINE WHICH AFFECT ONLY MEMBERSHIP RIGHTS AND NOT JOB RIGHTS ARE BEYOND THE REGULATORY COMPETENCE OF THE NATIONAL LABOR RELATIONS BOARD

Section 8(b)(1)(A) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq*) states:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *"

Thus, by its terms, Section 8(b)(1)(A) requires a showing: first, that the conduct of the respondent union is directed toward a particular end, i.e. that it affects the exercise of a Section 7 right; and second, that this conduct constitutes a prohibited means of attaining that end, i.e. that it constitutes restraint or coercion, as those terms were used by Congress. Both elements of the offense must be proved in order to prove a violation of that Section. Thus it is sufficient for our purposes to show that an expulsion of a member from a union is not a prohibited means under Section 8(b)(1)(A), i.e. that it is not restraint or coercion within the intent of Congress. For once this point is established, it will be plain that the Board has failed to prove its case here.[1]

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[1] The court below also found that the conduct of the Union did not impinge on the exercise of a Section 7 right (App. 34-38). We agree with that conclusion but do not cover this narrower ground of decisions since it has been fully briefed by the Union.

1. As this Court has stated, "The policy of the Act is to insulate *employee's jobs* from their organizational rights" *Radio Officers Union* v. *National Labor Relations Board,* 347 U.S. 17, 40 (1954). (Emphasis added.) The Act, however, does not so insulate union membership as well. For Congress did not intend to denominate union disciplinary actions, such as expulsions or suspensions, which affect membership rights and not job rights, as restraint or coercion under the Act. Section 8(b)(1)(A) was enacted in 1947; and for 17 years thereafter, until the decision in *Local 138, I.U.O.E. (Charles S. Skura),* 148 NLRB 579 (1964) and *H. B. Roberts,* 148 NLRB 674 (1964), *enforced* 350 F.2d 427 (C.A. D.C. Cir., 1965), which are the predicate for the decision here, the Board and the courts recognized without exception this limitation on the scope of the Act, *see, e.g., Minneapolis Star & Tribune Co.,* 109 NLRB 727 (1954) (fine for failing to attend meetings and to perform picket duty not violative of Section 8(b)(1)(A); *American Newspaper Publishers Assn.* v. *National Labor Relations Board,* 193 F.2d 782 (C.A. 7th Cir. 1951) *certiorari denied on this point* 344 U.S. 812 (threat of expulsion to force commission of alleged unfair labor practices not violative of Section 8(b)(1)(A)); *NLRB General Counsel Administrative Ruling,* Case No. 1059, 35 LRRM 1167 (1954) (no complaint would issue because of suspension for filing charges with the Board); *NLRB General Counsel Administrative Ruling,* Case No. K-103, 37 LRRM 1103 (1955) (no complaint would issue because of fine for failing to exhaust internal remedies before instituting a charge). For this reason, in *Machinists* v. *Gonzales,* 356 U.S. 617 (1958), which holds that the pre-emption doctrine does not apply where the gravamen of the complaint is that there has been an illegal interference with union membership rights, this Court stated (*Id.* at 620):

> "The protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to §8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .'"

Moreover, even after the *Skura* decision, this Court in its decision in *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), continued to hew to the essence of *Gonzales*. In *Allis-Chalmers* the union levied fines enforceable by court action, and in one case enforced by court action, on members who crossed the union's picket line. The argument that resort to a judicial forum takes this form of discipline out of the category of internal union discipline, and that the aid of the state so enhances the nature of the union's action that a court-enforced fine should not be considered a lesser included means of union discipline permitted by Congress in the proviso to Section 8(b)(1)(A), may be said to be not completely without logic. Nevertheless, this Court did not accept that argument and held that the fines in question were not restraint and coercion within the meaning of the Act. The Court's opinion first rejects the position, espoused by the Seventh Circuit in its opinion, that the meaning of "restrain or coerce" is precise and unambiguous by showing that a literal application of these words would lead to anomalous results which can in no way be said to have been envisaged by Congress (388 U.S. at 178-184). The Board argues (Bd. Br. 18-20) that this portion of the opinion is a policy ground for its ultimate holding. We submit that it is not. Rather it is the predicate for the Court's conclusion that an exploration of the legislative history was necessary in order to ascertain Congress's intent in enacting Section

8(b)(1)(A). The Court's holding, arrived at after a painstaking exploration of that history (388 U.S. at 184-193), was that, even without consideration of the proviso to Section 8(b)(1)(A) (*Id.* at 192), the legislative history shows (*Id.* at 195):

> "'. . . that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.''

And, even the dissent by Mr. Justice Black assumes that taking into account that proviso, all expulsions no matter what their basis are beyond the ambit of the Board's control (*Id.* at 214). The language of the Act and the overwhelming weight of its legislative history demonstrate that this conclusion is the only permissible one. Since this legislative history was fully explored in *Allis-Chalmers,* we note here only the major points.

Senator Ball, backed by Senator Taft, sponsored the amendment to S. 1126, 80th Cong., 1st Sess. (1947) which became Section 8(b)(1)(A) of the Act. See 93 Daily Cong. Rec. 4398-4401 (April 30, 1947), *Id.* at 4568 (May 2, 1947), 2 Legislative History of the Labor-Management Relations Act of 1947 (G.P.O. 1948) 1138-1143, 1216-1217 (hereinafter Leg. Hist.). Senator Ball said flatly:

> "It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions. . . . *It [a union] can expel him [a member] from the union at any time it wishes to do so, and for any reason.''* 93 Daily Cong. Rec. 4400-4401 (April 30, 1947), 2 Leg. Hist. 1141-1142. (Emphasis added.)

Nonetheless, out of an excess of caution, Senator Ball accepted as an amendment to his proposed Section 8(b)(1)(A) the present proviso to that Section. The sponsor of the proviso, Senator Holland, stated:

> "I have had some discussion with . . . Senators [sponsoring Section 8(b)(1)(A)] in reference to the meaning of the pending amendment [to enact Section 8(b)(1)(A)] and as to how seriously, if at all, it would affect the internal administration of a labor union. *Apparently, it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with the admission or expulsion of members, that is, with the question of membership. So I offer an amendment . . .*" 93 Daily Cong. Rec. 4398 (April 30, 1947), 2 Leg. Hist. 1139. (Emphasis added.)

And Senator Ball explained the import of the entire provision as follows:

> "That modification is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees. . . . *The modification covers the requirements and standards of membership in the union itself.*" 93 Daily Cong. Rec. 4559 (May 2, 1947), 2 Leg. Hist. 1200. (Emphasis added.)

The views of Senator Taft were consistent with those of Senators Ball and Holland. Thus, in urging the adoption of a provision to outlaw union restraint or coercion of employees, Senator Taft stated:

> "The language is perfectly clear. It has been interpreted by the courts. An employer cannot go to an employee and say, 'If you join this union you will be discharged.' He cannot go to an employee and threaten physical violence. He cannot employ police to accomplish that purpose. Now it is proposed that the union be bound *in the same way.* What could be more reasonable than that? Why should a union be able to go to an employee and threaten violence if he does not join the union? Why should a union be able to say to an employee, 'If you do not join this union we will see that

you cannot work in the plant'? What possible distinction can there be between an unfair labor practice of that kind on the part of an employer and a similar practice on the part of a union," 93 Daily Cong. Rec. 4142 (April 25, 1947), 2 Leg. Hist. 1025. *See also* S. Rep. No. 105, 80th Cong. 1st Sess., p. 20 (Supplemental Views) (1947), 1 Leg. Hist. 426.

But the protections afforded against union conduct were to extend only to the area already protected against employer conduct, an individual's status as an employee. They were not to extend to an individual's status as a union member. Senator Taft reiterated this theme on several occasions in connection with the provision which was to become Section 8(b)(2):

"The pending measure does not propose *any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion." 93 Daily Cong. Rec. 4318 (April 29, 1947), 2 Leg. Hist. 1097. (Emphasis added.)

* * * *

"We had testimony regarding the case of a union member who saw a shop steward knock down a foreman; and the union member was subpenaed to testify in court in the assault case. He testified truthfully that he saw the shop steward take the offensive and knock down the foreman. Thereupon, the union said that such testimony was contrary to good union practice, even though the union member had been subpenaed and was under oath to testify to the truth; and the union discharged him from union membership, and the employer had to discharge him, under the existing closed-shop contract.

> "In a case of that sort, the committee bill provides that the employer does not have to fire the employee. *The union can discharge him from union membership if it wishes to do so, but the employer does not have to discharge him from employment.*" 93 Daily Cong. Rec. 5088 (May 8, 1947) 2 Leg. Hist. 1420. *See also* 93 Daily Cong. Rec. 4317-4318 (April 29, 1947), 2 Leg. Hist. 1096 (Emphasis added.)

The proviso to Section 8(b)(1)(A) appeared unchanged in H.R. 3020, 80th Cong., 1st Sess. (1947), as passed by the Senate. With the substitution of the word "paragraph" for "subsection," it became part of the Conference Agreement and of the Taft-Hartley Act as finally passed.

As the last quotation indicates, Congress did not act in ignorance of the possibility that a union might discipline a member for filing charges or testifying against the union. Section 8(a)(4), making it an unfair labor practice for employers to take reprisals against employees who file charges or give testimony, had been on the books since the original Wagner Act. The Taft-Hartley Act provided no counterpart for union reprisals. But the Hartley bill, H.R. 3020, 80th Cong., 1st Sess. (1947), as reported to and passed by the House, contained in its Section 8(c) what was described by the House Labor Committee as a "bill of rights for union members." *See* H. Rep. No. 245, 80th Cong., 1st Sess., p. 31 (1947) 1 Leg. Hist. 322. Section 8(c)(5) would have made it an unfair labor practice for a union

> "to fine or discriminate against any member, or subject him to any discipline or penalty, on account of his having criticized, complained of, or made charges or instituted proceedings against, the organization or any of its officers. . . ."

Section 8(c)(5) was omitted, of course, from Taft-Hartley as eventually enacted. The House conferees commented:

> "Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organiza-

> tions with their members. One of the more important provisions of this section—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in effect—is included in the conference agreement (sec. 8(b)(5)) and has already been discussed. *The other parts of this subsection are omitted from the conference agreement as unfair labor practices.*" H. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 46 (1947), 1 Leg. Hist. 550. (Emphasis added.)

Significantly, the only portion of Section 8(c) which was retained by the conferees was the prohibition of excessive initiation fees as a condition of employment. This is in accord with the Taft-Hartley pattern of protecting employees in their status as employees, but not in their status as union members. The House's proposed ban on union fines or discipline where members file charges against the organization was deleted, with full awareness of the import of that deletion.

There are isolated pieces of the legislative history, *see* 93 Daily Cong. Rec. 4023 (April 25, 1947), 2 Leg. Hist. 1028, (Sen. Taft) 93 Daily Cong. Rec. 5001 (May 12, 1947), 2 Leg. Hist. 1472 (Sen. Wiley)[2] and a sentence or two of the

[2] The main thrust of these statements is directed toward the possibility of procedurally defective discipline, i.e. discipline by the fiat of undemocratic leaders, and not toward the possibility of discipline on a ground alleged to be against public policy. And there has been no showing here that the Union's rule was vague or that its hearing procedures were not fair. Indeed, the Union's members had a right to appeal any disciplinary penalty to the general membership of the local (App. 6). Moreover, at the present time every union disciplinary action must meet the standards set by Congress in Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411(a)(5). Thus, the Board's contention (Bd. Br. 24-25 and notes 26, 27) which is based on pre-1959 secondary sources, that if it does not have jurisdiction union members will be subjected without suitable redress to defective hearing procedures, is simply incorrect.

opinion of the Court in *Allis-Chalmers* (*Id.* at 192-193, 194-195)[3] which, if they stood alone, as they do not, might support the conclusion that Congress allowed the Board to police union expulsions which are "unreasonable." We submit, however, that the overwhelming weight of that history, *see particularly* the emphasized portions of the quotations on pp. 8-11, *supra.*, and the actual holding of the Court support our conclusion that all union discipline, whether the Board considers it reasonable or unreasonable, is conduct the regulation of which is outside of that agency's regulatory authority. This conclusion is strengthened if Section 8(b)(1)(A) is placed in perspective in the overall pattern of Congressional regulation of labor unions. For the fact of the matter is that until 1959 Congress never sought to protect membership rights in a union, and that when it did so it gave the courts and not the Board the jurisdiction to protect those rights. As this Court noted in *Allis-Chalmers* (388 U.S. at 193-194):

> "The 1959 Landrum-Griffin amendments, thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs, also negate the reach given §8(b)(1)(A) by the majority en banc below. 'To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.' Labor Board v. Drivers Local Union, 362 US 274, 291-292. In 1959 Congress did seek to

[3] Nothing in the Court's opinion supports the argument that the legality of expulsions, or other means of union discipline, depends on the end sought. Rather these statements indicate that if the means takes a particular form—a fine of over $100 or a fine levied by the fiat of an undemocratic union leader—it may not be legal.

protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline. The Eighty-sixth Congress was thus plainly of the view that union self-government was not regulated in 1947."

2. The essence of the Board's reply to the foregoing, as we glean it from the opinion in *Skura* and its brief here (Bd. Br. 16-17, 19-22), is that an expulsion or a fine, though not normally restraint or coercion, *compare Wisconsin Motor Corp.* 145 NLRB 1097, 1100, 1104 (1964) *enforced sub nom Scofield* v. *National Labor Relations Board,* ..... F.2d ...., 67 LRRM 2673 (C.A. 7th Cir., 1968) *Allis-Chalmers Manufacturing Co.,* 149 NLRB 67, 69 (1964), may become illegal conduct under Section 8(b)(1)(A) if the end sought runs counter to public policy. To us this signifies that the Board takes the position that depending on the end sought an otherwise legal means may become an unlawful means. The effect of this "logic" is to make it illegal for a union to do anything at all, no matter how innocent, if its aim is to have a member follow internal procedures before filing a charge. Thus, on this theory, a union would commit an unfair labor practice if it went to a member and peacefully reasoned with him in an attempt to convince him that it is in his best interest to exhaust his internal remedies first. No other result can follow from the Board's premise that it is the end sought, and that alone, which demonstrates the illegality of the union's internal disciplinary action here. And such a result is patently unwarranted and impermissible. Indeed, this Court's decision in *National Labor Relations Board* v. *Teamsters, Local 639 (Curtis Bros.),* 362 U.S. 274 (1960) so holds. For there, this Court rebuffed the Board's attempt to use Section 8(b)(1)(A) to prohibit the use of peaceful

picketing because that picketing had an ultimate object—to force recognition—which the Board believed to be against public policy. In reaching its conclusion, the Court emphasized (362 U.S. at 282, 290) that Section 8(b)(1)(A) gives the Board the limited authority to require the cessation of certain types of union conduct, principally violence, and that it does not empower the Board to interdict otherwise lawful means because of the end sought.

To put the foregoing another way, the Board's premise here appears to be that it is somehow vaguely more reprehensible for a union to discipline a member for filing unfair labor practice charges than for working behind a picket line. Since the means used is the same in each instance, this indicates that the Board justifies its holding on the ground that a more important Section 7 right is at stake in *Skura,* and the instant case, than in *Allis-Chalmers.* But overloading one factor in a multiplication cannot vary the result when the multiplier remains zero. A million multiplied by zero is the same as one multiplied by zero; it is zero. So too, it makes no difference whatsoever whether a great or insignificant Section 7 right is involved. Indeed, we do not believe that such gradations in Section 7 rights exist under the Act. It is not the Board's function to set up a hierarchy of Section 7 rights each of which is then accorded a different degree of protection proper to its relative station. *Cf. National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477 (1960). Thus, so long as a union does not resort to the forbidden *means* of violence or job discrimination, it cannot possibly violate Section 8(b)(1)(A), no matter how it may otherwise be said to impinge on a Section 7 right through internal discipline. For in the absence of violence or job discrimination, one of the essential elements of a Section 8(b)(1)(A) offense is simply not present.

The Board in its brief (Bd. Br. 15, 16) tries to paper over these fatal difficulties by stating that the expulsion here is coercive. But repetition of a characterization which has no logical underpinning does not supply that underpinning. If, as has now been settled, the fine enforceable by court action in *Allis-Chalmers* was not restraint or coercion, then the expulsion here cannot accurately be so characterized. Equally unavailing to the Board is the rationale offered by the District of Columbia Court in the *Roberts* case: "by filing a charge . . . [the union member] stepped beyond the internal affairs of the Union and into the public domain," 350 F.2d at 429. For it is equally true that the members who crossed the picket line at Allis-Chalmers quite literally "stepped beyond the internal affairs of the union." The test of whether a particular disciplinary action is an aspect of the union's internal affairs for the purposes of the Act does not turn on the nature of the members' derelection, but rather on the means chosen by the union in disciplining him. If the *Roberts* rule were correct in holding that legality turns on what the member has done, a union could have a man discharged for failing to come to union meetings. For the member's course of action is certainly related to internal union affairs. But since *Radio Officers* there can be no doubt that the union would commit a violation of the Act in such a case since it is the union's conduct which is the determinative factor.

Finally, it is plain that the Board cannot find support for its position in this Court's decision in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1968). That case, of course, affirms the general proposition that one of the purposes of the Act is to insure that "people [are] free to make charges of unfair labor practices" without being coerced, *Id.* at 236. The Board, however, is not empowered

to enforce this broad policy in every instance; it is empowered only to remedy unfair labor practices. This is not a distinction without a difference. If, for example, Mrs. Nash's bank, acting alone and not as an agent of her employer, had cancelled a loan to her because she had filed a charge, its action would contravene public policy but would not constitute an unfair labor practice. For Section 8 applies only to employers, unions and their agents. By the same token, the general proposition enunciated in *Nash* does not show that an expulsion is coercion within the meaning of Section 8(b)(1)(A) and its proviso. To the contrary, as we have demonstrated, pp. 6-14, *supra.*, Congress made it plain that expulsions, suspensions, and other nonviolent union discipline which affect a union member as a member and not as an employee are not the types of conduct interdicted by that Section.

3. As we have just shown, even if an expulsion of a union member for failing to exhaust internal remedies were to be held to be against public policy, that holding would not help the Board; but we need not rest on this point alone, for in fact the Board's conception of the applicable public policy here is wrong. As the court below properly recognized (App. 38-40), the public policy of the United States on the issue presented here is set out in Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411 (a)(4)) which states:

> "*Protection of the Right to Sue.*—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any leg-

islature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *."

And that provision permits unions to discipline members who go to the Board without exhausting internal remedies for four months.

This is plainly the most logical conclusion to be drawn from the bare language and structure of Section 101(a)(4). As the court below stated (App. 39-40):

> "To avoid the impact of this proviso, the Board argues that the proviso does not say who may require the union member to exhaust internal hearing procedures and then reaches the surprising conclusion that it is the Board, rather than any labor organization, that is authorized by Congress to require that a union member resort to reasonable intra-union procedures. We think this construction does violence to the structure and the sense of section 101. That section is entitled, "Bill of rights; constitution and bylaws of labor organizations." It consists of a number of provisions prescribing what unions may and may not do and require in the conduct of their affairs and in the treatment of their members. The general prohibition in the subsection here in question is expressly directed against labor organizations. Logically, and in normal reading, the attendant and qualifying proviso is an exception stating what such an organization may do despite the preceding general restriction upon its action. Moreover, there is no need for a proviso to authorize a court or an administrative body to postpone its action until a litigant shall exhaust intra-union remedies, since judicial and quasi-judicial bodies frequently exercise such discretionary power to postpone their own action pending the exhaustion of other remedies as a matter of inherent right without benefit of legislation."

This reasoning follows the lead of the decisions of this Court. The office of a proviso is well understood. It is "to except something from the operative effect, or to qualify the generality, of the substantive enactment to *which it is attached.*" *Cox* v. *Hart*, 260 U.S. 427, 435 (1922). (Emphasis added.) *See also* 2 Sutherland, Statutory Construction, § 4932, p. 469 (3d ed., 1943). *Cf. National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46 (1964): "There is nothing in the legislative history which suggests that the protection of the proviso [to Section 8(b)(4) of the Act] was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress." The prohibition of Section 101(a)(4) clearly applies to *union-imposed* restrictions. It follows that the exception contained in the proviso must likewise apply to *union-imposed* restrictions. Accordingly, the authorization for a requirement that union members pursue internal remedies for four months must be an authorization for such a requirement when imposed by *unions*.

As the Board points out (Bd. Br. 21 n. 21), there are two rather distinct forms of the exhaustion of remedies doctrine. The first is a jurisdictional rule which sets the time at which a case involving associational rights is to be considered ripe for adjudication. It rests on the wisdom of judicial self-restraint when a dispute is within the purview of a private tribunal and is applicable whether or not there is an associational bylaw which requires resort to internal remedies at the pain of sanctions such as expulsion or suspension. The second is a rule which states that union disciplinary actions based on a requirement of exhaustion of remedies are actions based on a valid norm and for that reason are not to be upset by the courts. This being so, it is within the realm of possibility to assign two

readings, other than the one we urge, to the proviso to Section 101(a)(4). One would be that the proviso relates to and regulates both forms of the exhaustion doctrine. The other is that the proviso relates to and regulates only the jurisdictional rule. Only the last reading of the proviso would help the Board here. Thus, and this is particularly true in light of the structure of Section 101(a)(4), it is incumbent upon the Board to show that the legislative history precludes both the natural reading of the proviso, and the reading which assigns the proviso a role with respect to both forms of the exhaustion doctrine. The weight of this considerable burden is increased by the fact that the construction the Board proposes creates two serious policy problems while the construction we propose creates none, *see* pp. 25-29 *infra*.

The first of these problems relates to the separation of powers between the legislative and judicial branches of government. The construction the Board argues for would require both federal and state courts to hear a case four months after the cause of action arises, even though the union discipline in question was based on a complicated and arcane rule relating to the purely fraternal aspects of the association, even though the discipline had been stayed pending internal appeals, and even though the union's internal appeal apparatus was sound and fair. In short, it would require the court to act even though the case is clearly not ripe for adjudication. For if the exhaustion of remedies rule had been modified by Section 101(a)(4) to allow the courts to permit only four months of exhaustion, then that Section must mean that they can never under any circumstances refuse to hear a case after that period has elapsed. Such a direction from Congress to the courts would, of course, trench on the inherent powers of the latter in a most dangerous, and possibly unconstitu-

tional manner, *see e.g. Marbury* v. *Madison*, 1 Cranch 137 (1803). The second of these problems relates to federalism. The LMRDA applies to state as well as federal courts. It seems unlikely that Congress would undertake a task as sensitive as regulating state court procedure without giving a clear indication of its intent to do so. Yet, there is no such indication in the legislative history of Section 101 (a)(4).

With this background in mind we turn now to the legislative history. The present Section 101(a)(4), including the proviso, is with one exception exactly the same as Section 101(a)(4) of S. 1555, 86th Cong., 1st Sess., as it passed the Senate, see 1 Legislative History of the Labor Management Reporting and Disclosure Act of 1959, p. 520 (G.P.O. 1959) (hereinafter Leg. Hist. LMRDA). That exception is that S. 1555 allowed for six months of exhaustion while the LMRDA allows for only four months. Both Senator Goldwater and Representative Griffin criticized the six-month time limit in S. 1555 on the specific ground that while the union rules it allowed, if observed, would only delay access to the courts, it would enable a union, in effect, to bar a member from filing charges with the Board since the statute of limitations under the Act is also six months. Said Senator Goldwater:

> "If, in order to be eligible for the protection of his right to sue under this provision of the bill of rights, a union member must wait 6 months while exhausting his internal union hearing procedures, he finds that the NLRB will refuse to process his unfair labor practice charge because the Taft-Hartley Act's 6-month time limitation on the filing of charges has run out. On the other hand, if having failed to exhaust his union hearing procedures, he fails to wait the required 6 months and files his charge with the NLRB in order to escape the Taft-Hartley time limitation, he loses the protection of the right to sue provision of the bill of rights,

and the union, if it wishes *may discipline him for having filed the charge.*" 105 Daily Cong. Rec. 9108 (June 8, 1959), 2 Leg. Hist. LMRDA 1280. (Emphasis added.) *See also* 105 Daily Cong. Rec. 6847 (May 7, 1959), 2 Leg. Hist. LMRDA 1270 (Sen. Goldwater).

The Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess., in a provision identical to Section 101(a)(4) of the LMRDA as passed, met this criticism by reducing the time period from six months to four. The two co-sponsors, Representatives Landrum and Griffin, explained the change as follows:

> "Since the Taft-Hartley law prescribes a 6-month statute of limitations for the filing of unfair labor practice charges, the Senate's 6-month limitation might prevent a member's access to remedies provided under the National Labor Relations Act. In the substitute, we have specified a 4-month limit for pursuit of internal union remedies under the bill of rights." 105 Daily Cong. Rec. 13089 (July 27, 1959), 2 Leg. Hist. LMRDA 1520. *See also* 105 Daily Cong. Rec. 14193-14194 (Aug. 11, 1959), 2 Leg. Hist. LMRDA 1566-1567 (Rep. Griffin).

The modification satisfied the objections of Senator Goldwater, who said:

> "The Landrum-Griffin bill, both as introduced and as passed, cut such waiting period to 4 months thus eliminating the gimmick and preserving the union member's rights both under the bill of rights and under the Taft-Hartley Act." 105 Daily Cong. Rec. A8510 (Oct. 2, 1959), 2 Leg. Hist. LMRDA 1844.

After the Conference Committee on the LMRDA had accepted the basic approach of Section 101(a)(4) of S. 1555 with the modified time limit of four months suggested by the House, Senator Kennedy, the sponsor of S. 1555 and the Senate spokesman at the Conference, made it absolutely clear that the focus of the Section was on union imposed limitation and that it was not intended to straight-jacket

the courts in applying their jurisdictional rules. No other conclusion can be drawn from his statement when it is read in full:

> "The protection of the right to sue provision originated in the Senate bill and was adopted verbatim in the Landrum-Griffin bill except that the first proviso limiting exhaustion of internal hearing procedures was changed from 6 months to 4 months. The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization. On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws. Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case. So long as the union member is not prevented by his union from resorting to the courts, the intent and purpose of the "right to sue" provision is fulfilled, and any requirements which the court may then impose in terms of pursuing reasonable remedies within the organization to redress violation of his union constitutional rights will not conflict with the statute. The doctrine of exhaustion of reasonable internal union remedies for violation of union laws is just as firmly established as the doctrine of exhausting reasonable administrative agency provisions prior to action by courts.
>
> "The 4-month limitation in the House bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies. For example, the National Labor Relations Board is not prohibited from entertaining

charges by a member against a labor organization even though 4 months has not elapsed." 105 Daily Cong. Rec. 16414 (Sept. 3, 1959) 2 Leg. Hist. LMRDA 1432, *see also* 105 Daily Cong. Rec. 14356 (Aug. 12, 1959) 2 Leg. Hist. LMRDA 1632 (Rep. O'Hara).

The last sentence of Senator Kennedy's remarks, which was echoed by Representative Griffin, 105 Daily Cong. Rec. A7915 (Sept. 10, 1959) 2 Leg. Hist. LMRDA 1811, reinforces our argument. For the Board has never applied an exhaustion of remedies rule and Congress was aware of this, *see e.g.* 105 Daily Cong. Rec. 14495 (Aug. 13, 1959), 2 Leg. Hist. LMRDA 1667 (Rep. McCormack). In light of this demonstrated irrelevance of Section 101(a)(4) to the capacity of the Board to process charges, the great concern manifested about reducing the allowable exhaustion period from six months to four months becomes utterly inexplicable unless our proposition is sound. The proviso must apply to internal union discipline of members for filing charges with the Board. In revising the proviso, Congress was intent only on preventing union disciplinary rules from requiring exhaustion for such a long period that a member who complied with the union's rules would be barred by the six-month statute of limitations from subsequently filing charges with the Board if intraunion relief was not obtained. Implicit in this approach is congressional acceptance of union rules requiring exhaustion of internal remedies for the lesser period of four months before filing unfair labor practice charges.

As the Board notes (Bd. Br. 32-33), it is true that statements were made in the House which would indicate that the proviso did apply to the jurisdiction form of the exhaustion doctrine. But this does not prove the Board's case. For these statements are equally consistent with the view that the proviso affects the exhaustion doctrine in

both its aspects.[4] None of them stand for the proposition that the proviso is addressed solely to the jurisdictional rule. And only that proposition can aid the Board.

4. Since Congress has spoken we believe that it borders on presumption to argue the soundness of the policy choice it made. But the Board's brief is devoted, to a substantial degree, to an attempt to show that union discipline of members who do not exhaust internal remedies for four months is against public policy (Bd. Br. 20-27). The Board's arguments are unsound and should not stand unrebutted.

Public policy in this area must take into account and balance the interest of the complaining union member, the administration of the Act, and the union as an institution. First, there are the interests of the allegedly aggrieved union member. We submit that our position has a minor impact on his interests. It is plain that no matter how this case is decided, he will continue to receive protection against union violence, or union-caused job discrimination, in reprisal for his exercise of Section 7 rights since both are means for enforcing union rules which have been interdicted by Section 8(b)(1)(A). The member is also guaranteed "reasonable hearing procedures" within the union as the *quid pro quo* for the union's right to discipline him for bypassing internal procedures. Moreover, no matter

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[4] As Congressman Foley, who is quoted by the Board, went on to state, 105 Daily Cong. Rec. 15563 (Aug. 17, 1959), 2 Leg. Hist. LMRDA 1600:

> "The Griffin bill does not indicate who will decide if and when a member is required to exhaust the internal remedies. Can the member decide? Can the union decide? Must a court decide? Must the Secretary of Labor decide? By making the exhaustion of remedies discretionary and without indicating who has the power to exercise the discretion, the Griffin bill creates confusion and does not define and protect any right of a union member."

how this case is decided and no matter what the member does in contravention of the union's rules, he will continue to receive the protection of the right to fair representation by the union, *see e.g. Vaca* v. *Sipes,* 386 U.S. 171 (1967). And it is also plain that if this Court should hold that union expulsions are completely outside the regulatory competence of the Board, unions would not gain the power to discipline members who go to the Board after exhausting their internal remedies for four months. For a union to attempt to do so would be for it to violate Section 101(a)(4) of the LMRDA. Thus, we take it that the Board's concern (Bd. Br. 24-25) that a member may "tire and give up" if required to exhaust internal remedies is rhetoric pure and simple.

It is, of course, true (Bd. Br. 25-26) that the requirement, added by Congress for the benefit of union members, that the union must provide "reasonable hearing procedures" if it wishes to discipline members who bypass an internal appeal, may cause a member to decide to go directly to the Board. The only time this will have practical consequences for the member is when the union does, in fact, provide reasonable hearing procedures. Congress sought to meet this problem, which does not appear to us to be of major dimensions since the Congressional standard is not a complex one, by reducing the exhaustion period to four months, thereby protecting ultimate recourse to the Board for a member who is in doubt as to whether his union's procedures are reasonable. It is true that this solution may delay recourse to the Board. But Congress decided that this delaying or "chilling" effect, to use the Board's phrase, was warranted. That it seems to us is the end of the matter. For the Board's argument on this point is really that it was impermissible for Congress to solve the problem as it did or indeed to do anything less than validate every union

rule requiring exhaustion, or none of them, because a more discriminating approach could be a snare to a member faced with a debatable situation. There can be no doubt that this argument is novel in its approach to the powers of Congress but it can hardly be said to be sound.

Second, there is the interest of the Board in administering the Act. While the Board does not acknowledge the point, there are substantial benefits for it in the position we advocate. The general policy favoring conservation of judicial resources—of not deciding cases which nonjudicial corrective measures may render moot—lends weight to the exhaustion rule. And even if the controversy ultimately reaches the Board, review within the union may have sharpened the issues by narrowing and clarifying the points in dispute and by providing additional information and insight on those points. These factors seem especially pertinent in the instant context since the Board must cope as best it can with a veritable avalanche of charges. To be sure, the Board does enforce rights that are in part public and in part private, *see International Union UAW* v. *Scofield*, 382 U.S. 205, 218 (1965). This, however, does not mean, as the Board seemingly argues (Bd. Br. 23-24), that private resolution of a dispute within its competence is against public policy. The very purpose of the national labor policy is to encourage the formation of private institutions, such as arbitration panels and union tribunals, which are competent to deal with problems which might otherwise prove to be a threat to the uninterrupted flow of commerce. *Cf. United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 566-568 (1960). Indeed, the Board has recognized that this is so and has demonstrated the fallaciousness of its argument here by deferring to private machinery for dispute resolution even though the party with the underlying complaint is not satisfied with the result reached by that machinery, *see e.g. Ramsey* v.

National Labor Relations Board, 327 F.2d 784 (C.A. 7th Cir. 1964), *certiorari denied* 377 U.S. 1003. And here, of course, we do not ask for that much. We make no contention that the Board should completely defer to a union tribunal if the member remains dissatisfied after four months. If, after that time, the member is still dissatisfied, we fully recognize that the union can do nothing to deprive him of his day before the Board. But surely, in light of Section 10(b) it is accurate to say that the Board exists only to solve the problems of those who have a grievance and that it was not created to roam at large doing good as it sees it. And Congress has not decreed that the Board is to be the only tribunal in the field. Its function is to supplement other private tribunals if and when they fail to solve a problem and not to supplant them in the first instance, *Cf. Carey* v. *Westinghouse Electrical Corp.*, 375 U.S. 261, 265, 272 (1964).

Finally, there are the interests of the union as an institution. It benefits from the permission to require exhaustion by gaining the opportunity to solve a problem without expending the time and money, and suffering the embarrassment, that are inherent in a public contest. Internal responsibility and control are strengthened if members are encouraged to settle problems within the organization. Moreover, lawsuits tend to harden positions, to force a choice between extremes, and to permit only one victor. For unions, more than for many other litigants, this is likely to be an unsatisfactory solution. While other adversaries may separate after the decision, the union and its complaining member must continue to work in close relationship. Internal remedies—especially where informal, private, and flexible—can promote compromise and thus the interests of all the parties. Of course, as the Board notes (Bd. Br. 23-24), the union may fail. But if it does, it faces the probability of enhanced liability if its processes cause

delay. This is a potent spur for it to disclaim jurisdiction if the member's complaint encompasses a matter beyond the union's competence to handle.

We submit that a balancing of the foregoing considerations leads to the conclusion that Congress was correct in deciding that the limited right to discipline members for bypassing internal remedies it accorded to unions is consonant with the public interest.

5. The burden of our argument has been that it would be unfaithful to the limited role Congress envisaged for the Board, both in 1947 and 1959, to allow it to exert any control at all over nonviolent union discipline that affects membership rights but not job rights. We have argued further that even if the Board has a function to perform in this area, it would be unfaithful to the public policy of the United States as enunciated in Section 101(a)(4) of the LMRDA, which is to preserve internal union hearing procedures by allowing unions to discipline members who do not exhaust their internal remedies for four months, to allow the Board to find that such discipline is an unfair labor practice. We believe that vital and legitimate interests would be impaired if this Court were to reject either or both of these arguments. But should it do so and enforce the Board's order, we submit that the Court should at the same time make it clear that the Board and the Ninth Circuit were correct in holding that it is not an unfair labor practice to expel or suspend a member who files a decertification petition against his own union, *United Steelworkers of America, Local 4028*, 154 NLRB 692 (1965), *affirmed sub nom Price* v. *National Labor Relations Board*, 373 F.2d 443 (C.A. 9th Cir., 1967), *pending on a petition for certiorari* No. 399 This Term. A reversal of the Board's policy on this issue would strike a blow at the very existence of

unions that should on no account be countenanced. As the Ninth Circuit noted (373 F.2d at 447):

> "[Price, the suspended union member] sought to attack the union's position as bargaining agent, which is, as the Board says, in a very real sense an attack on the very existence of the union. We think that, at the least, the proviso [to Section 8(b)(1)(A)] was intended to permit the union to suspend or expel a member who takes such a position. Otherwise, during the pre-election campaign, the member could campaign against the union while remaining a member and therefore privy to the union's strategy and tactics. We can see no policy reason for requiring the union to retain a member who takes such a position."

Both the inhibitions placed upon unions by Title I of the LMRDA, and the rights specifically preserved to unions in that Title support the approach of the Ninth Circuit. A union cannot effectively wage its election campaign if its opponents—the very persons seeking to decertify it—are entitled to "equal rights and privileges . . . to participate in the deliberations and vote upon the business of [its] meetings"—rights and privileges guaranteed to *members* by Section 101(a)(1). Moreover, Congress expressly preserved the right of unions to discipline members who engage in acts of disloyalty to the union. A proviso to Section 101(a)(2) declares that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

The foregoing reinforces a point we have stressed throughout our brief. In 1959 Congress developed precise standards to govern the imposition of union discipline. Allowing the Board to intrude into this area and to apply the very different standards of the Act to the same conduct

is certain in the long run to upset the careful balancing of interests achieved in the LMRDA.

CONCLUSION

For the above stated reasons, as well as those set out in the Union's brief, the judgment of the United States Court of Appeals for the Third Circuit, setting aside the Board's order, should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 796.—October Term, 1967.

National Labor Relations Board, Petitioner, *v.* Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and Its Local 22.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May 27, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

One Holder, a member of respondent unions, filed with the National Labor Relations Board an unfair labor practice charge, alleging that Local 22 had violated § 8 (b)(1)(A) of the National Labor Relations Act,[1] 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A), by causing his employer to discriminate against him because he had engaged in protected activity with respect to his employ-

[1] Section 8 (b) provides in part: "It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or corece (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ."

Section 7, 61 Stat. 140, 29 U. S. C. § 157, contains the following guarantee of rights: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

ment.[2] The filing of this charge followed an accusation by Holder to Local 22 that its president had violated the constitution of the International. The local decided in favor of its president; but Holder did not pursue the intra-union appeals procedure that was available to him and filed the unfair labor practice charge instead, based on the same alleged violations by the president.

Section 5 of the constitution of the International Union, which was binding on Local 22, contained the following provision relative to grievances of union members:

> "Every member . . . considering himself . . . aggrieved by any action of this Union, the [General Executive Board], a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union."

While Holder's charge was pending before the Board, Local 22 lodged a complaint in internal union proceedings against Holder alleging he had violated § 5 of the International's constitution by filing his charge with the Board before he had exhausted his internal remedies. After a hearing before Local 22, Holder was found guilty and expelled from both respondent unions. He then

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[2] This charge, filed with the Board February 28, 1964, was directed solely against respondent International Union and alleged that:

"On or about October 8, 1964, the above named labor organization caused the United States Lines [employer] to discriminate against Edwin D. Holder because he engaged in concerted activities with respect to the conditions of his employement.

"By these and other acts, the above named labor organization has interfered with, restrained and coerced, and continues to interfere with, restrain and coerce the Company's employees in the exercise of rights guaranteed in Section 7 of the Act."

By letter of May 20, 1964, the Regional Director informed Holder that this charge was dismissed.

appealed to the General Executive Board of the International which affirmed the local's action on October 7, 1946.

On October 28, 1964, Holder filed a second charge with the Board, claiming his expulsion for filing the first charge was unlawful. That charge is the basis of the instant case.

A complaint issued; and the Board found that the respondent unions had violated § 8 (b)(1)(A) of the Act by expelling Holder for filing a charge with the Board without first having exhausted the intra-union procedures. 159 N. L. R. B. 1065. It issued a remedial order, which the Court of Appeals refused to enforce. 377 F. 2d 702. The case is here on writ of certiorari. 389 U. S. 1034.

The important question is whether consistent with the applicable federal statutes a union may penalize one of its members for seeking the aid of the Board without exhausting all internal union remedies. There is a threshold question, however, concerning the adequacy of Holder's first or original charge to the Board against respondents. Holder charged discrimination practiced against him because, to use the words of the Regional Director as he paraphrased the charge in the complaint, Holder had engaged "in certain protected activity" of an unspecified nature "with respect to his employment." It is pointed out that § 8 (b)(1)(A) protects only "the exercise of rights guaranteed by section 7";[3] and that § 7 "says nothing about any right to file charges with the Board." 379 F. 2d, at 706. That, however, is not the issue. The charge by Holder that he was discriminated against because he had engaged "in certain protected activity" was a sufficent way to allege an impairment of § 7 rights. "The charge is not proof. It merely sets in motion the machinery of an inquiry." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318

[3] N. 1. *supra*.

U. S. 9, 18. Moreover, no issue was raised before the Board concerning the nature of the "protected activity." The answer of respondents insofar as the original charge is concerned said only that the charge made by Holder to the Board was based upon precisely the same facts as those on which his internal union charges against the president of the Local had been based. We must, therefore, assume that the initial charge was one within the ambit of § 7 and so plainly within it that no party undertook to question it.

The main issue in the case is whether Holder could be expelled for filing the charge with the Board without first having exhausted "all remedies and appeals within the Union" [4] as provided in § 5 of the constitution, already quoted.

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[4] These remedies are provided for in § 3 of the Constitution:

"No Union member in good standing in any Local may be suspended or expelled or otherwise disciplined or penalized without a fair and open trial, of which reasonable notice shall be given the accused member, before the Trial Board of the Local Union . . . . The accused member or members or the accusers may appeal the decision of the local Union's Executive Board to the regular meeting of the General Membership of the Local Union next following the meeting of the Executive Board at which the decision was rendered, and within thirty (30 days after the membership's decision may appeal to the General Executive Board. The General Executive Board shall, after reasonable notice to the appellant of the time and place of hearing, hold a fair and open hearing on such appeal and, not later than 130 days after the first regular meeting of the General Executive Board following receipt of the appeal at the National Office, and in any event not later than the first day of the National Convention, shall render its decision affirming, overruling, or modifying either the findings of guilt or innocence, or the penalty imposed. Both the accused and the accuser shall have the right to file an appeal to the next National Convention by sending such appeal to the National Office of this Union by registered mail not later than thirty days after the decision by the General Executive Board."

Although Holder did not take any internal appeal from the local's original adverse decision on his charge to it against the president,

Section 8 (b)(1)(A) in its proviso [5] preserves to a union "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

The Court of Appeals concluded that while this proviso would not permit a union to expel a member because he filed an unfair labor practice charge against the union, it permits a rule which gives the union "a fair opportunity to correct its own wrong before the injured member should have recourse to the Board." 377 F. 2d, at 707.

We held in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, that § 8 (b)(1)(A) does not prevent a union from imposing fines on members who cross a picket line created to implement an authorized strike. The strike, we said, "is the ultimate weapon in labor's arsenal for achieving agreement upon its terms" and the power to fine or expel a strikebreaker "'is essential if the union is to be an effective bargaining agent.'" *Id.*, at 181.

Thus § 8 (b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play.

Section 10 (b) of the Act, 61 Stat. 146, 129 U. S. C. § 160 (b), forbids issuance of a complaint based on conduct occurring more than six months prior to filing of the charge—a provision promoting promptness. A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy. The Board cannot initiate its own proceedings; implementation of the Act is dependent "upon the initiative of individual persons." *Nash* v. *Florida Industrial Commission*, 389 U. S. 235,

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he did appeal his expulsion to the General Executive Board of the International, which affirmed.

[5] N. 1, *supra*.

238. The policy of keeping people "completely free from coercion," *id.*, against making complaints to the Board is therefore important in the functioning of the Act as an organic whole. A restriction such as we find in § 5 of the International's constitution is contrary to that policy, as it is applied here. A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances.[6] Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. That was the philosophy of the Board in the *Skura* case, *Local 138, International Union of Operating Engineers,* 148 N. L. R. B. 679; and we agree that the overriding public interests makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affair of the union are involved.

In the present case a whole complex of public policy issues was raised by Holder's original charge. It implicated not only the union but the employer. The employer might also have been made a party and comprehensive and coordinated remedies provided. Those issues cannot be fully explored in an internal union proceeding. There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member. If the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance

[6] See Cox, Internal Affairs of Labor Unions under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 839 (1960); Summers, Legal Limitations in Union Discipline, 64 Harv. L. Rev. 1049, 1067–1068 (1951); Summers, The Usefulness of Law in Achieving Union Democracy, 48 Am. Econ. Rev. 44, 47 (1958).

never had. The Court of Appeals recognized that this might be the consequence and said that resort to an intra-union remedy would not be required if it "would impose unreasonable delay or hardship upon the complainant." 379 F. 2d, at 707.

The difficulty is that a member would have to guess what a court ultimately would hold. If he guessed wrong and filed the charge with the Board without exhausting internal union procedures, he would have no recourse against the discipline of the union. That risk alone is likely to chill the exercise of a member's right to a Board remedy and induce him to forgo his grievance or pursue a futile union procedure. That is the judgment of the Board; and we think it comports with the policy of the Act. That is to say, the proviso in § 8 (b)(1)(A) that unions may design their own rules respecting "the acquisition or retention of membership" is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union.

The Court of Appeals found support for its contrary position in § 101 (a)(4) of the Labor-Management Reporting and Disclosure Act of 1959.[7] 73 Stat. 522, 29 U. S. C. § 411 (a)(4). While that provision prohibits a union from limiting the right of a member to institute an action in any court or in a proceeding before any

[7] Section 101 (a)(4) provides: "No labor organization shall limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency . . . or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings . . . ."

administrative agency," it provides that a member "may be required to exhaust reasonable hearing procedures" "not to exceed a four-month lapse of time."

We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency.[8]

The legislative history is not very illuminating. Some members of the House who spoke indicated that there was room for judicial discretion whether to remit the member to available internal union remedies.[9] In the Senate the fear was expressed that the new section would give unions power to punish their members for filing charges with the Board prior to exhaustion of their internal remedies.[10] In the Senate the continuance of

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[8] See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; compare *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496. The requirement of exhaustion is a matter within the sound discretion of the courts. See, *e. g.*, *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 16–17. And see *Leedom* v. *Kyne*, 358 U. S. 184, 188–189; *California Comm'n* v. *United States*, 355 U. S. 534, 539–540. Exhaustion is not required when the administrative remedies are inadequate. *Greene* v. *United States*, 376 U. S. 149; *McNeese* v. *Board of Education*, 373 U. S. 668. See generally, 3 Davis, Administrative Law Treatise (1958), § 20.07. When the complaint, as in the instant case, raises a matter that is in the public domain and beyond the internal affairs of the union, the union's internal procedures are, as previously explained, plainly inadequate.

[9] 105 Cong. Rec. 15835 (McCormack); *id.*, at 15689–15690 (O'Hara); *id.*, at 15563 (Foley).

[10] 105 Cong. Rec. 10095 (Goldwater).

union grievance procedures under the new section was emphasized.[11] It was indeed expressly stated by Senator John F. Kennedy reporting from the Conference Committee.[12]

> "The four-month limitation in the House Bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies."

Yet it plainly appears from those speaking for the Conference Report that a member was to be permitted to complain to the Board even before the end of the four-month period. Congressman Griffin reported: [13]

> ". . . the proviso was not intended to limit in any way the right of a union member under the Labor-Management Relations Act of 1947, as amended, to file unfair labor practice charges against a union, or the right of the NLRB to entertain such charges, even though a 4-month period may not have elapsed."

And on the Senate side, Senator Kennedy said that the proviso was not intended "to invalidate the considerable body of state and federal court decisions of many years standing which require, *or do not require,* the exhaustion of its internal remedies prior to court intervention *depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case.*" (Emphasis added.) Nor, he said, "was it intended to prohibit the National Labor Relations Board . . . from entertaining charges by a member against a labor organization even though 4 months has not elapsed." [14]

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[11] 105 Cong. Rec. 17899 (John F. Kennedy).

[12] 105 Cong. Rec. 17899.

[13] 105 Cong. Rec. 18152.

[14] 105 Cong. Rec. 17899.

We conclude that unions were authorized to have hearing procedures for processing grievances of members, provided those procedures did not consume more than four months of time; but that a court or agency might consider whether a particular procedure was "reasonable" and entertain the complaint even though those procedures had not been "exhausted." We also conclude, for reasons stated earlier in this opinion, that where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not grounds for expulsion from a union. We hold that the Board properly entertained the complaint of Holder and that its order should be enforced.

Reversed.

MR. JUSTICE STEWART dissents. He would affirm the judgment, agreeing substantially with the opinion of the Court of Appeals for the Third Circuit. 379 F. 2d 702.

SUPREME COURT OF THE UNITED STATES

No. 796.—October Term, 1967.

National Labor Relations Board, Petitioner, *v.* Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, and Its Local 22.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May 27, 1968.]

Mr. Justice Harlan, concurring.

I am persuaded by the legislative history, summarized in part by the Court, that the proviso to § 101 (a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U. S. C. § 411 (a)(4), was intended simply to permit a court or agency to require a union member to exhaust internal union remedies of less than four months' duration before invoking outside assistance. See generally *Detroy* v. *American Guild of Variety Artists*, 286 F. 2d 75, 78. I cannot, however, agree that a union may punish a member for his invocation of his remedies before a court or agency "where the complaint or grievance . . . concern[s] an internal union matter," and thus does not touch any "part of the public domain covered by the Act . . . ." *Ante*, at 10. Assuming *arguendo* that there are member-union grievances untouched by the various federal labor statutes, this dichotomy has, it seems to me, precisely the disadvantage that the Court has found in the Third Circuit's construction of the proviso: it compels a member to gamble his union membership, and often his employment, on the accuracy of his understanding of the federal labor laws.

Finally, it is appropriate to emphasize that courts and agencies will frustrate an important purpose of the 1959

legislation if they do not, in fact, regularly compel union members "to exhaust reasonable hearing procedures" within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function.* See *Detroy* v. *American Guild of Variety Artists, supra,* at 79.

With these modifications, I concur in the opinion and judgment of the Court.

*It should be noted that many union constitutions have elaborate provisions for internal appeals, and that these provisions were often added or modified as a consequence of § 101 (a) (4). See Kroner, Title I of the LMRDA: Some Problems of Legal Method and Mythology, 43 N. Y. U. L. Rev. 280, 302, n. 72.